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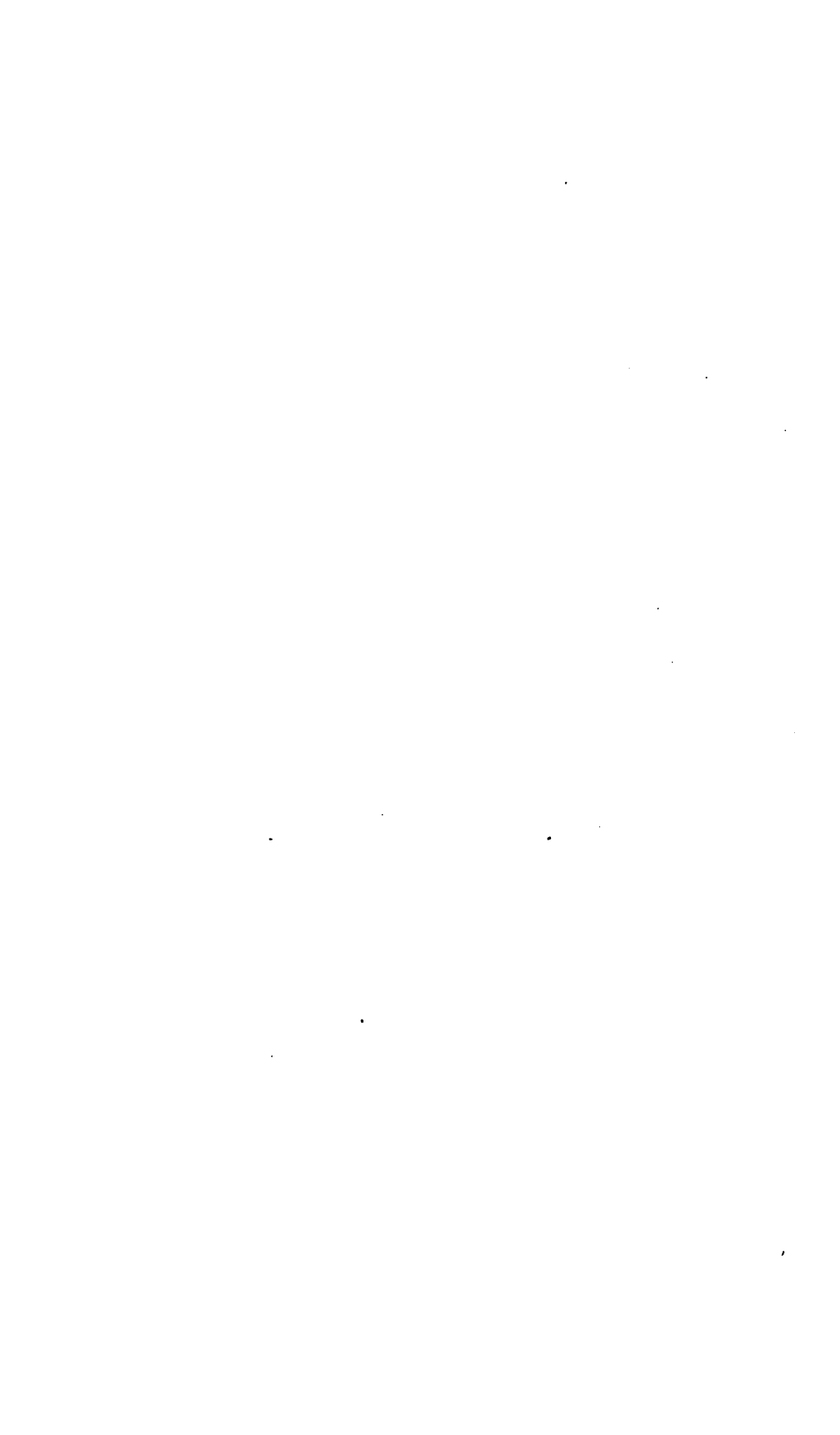
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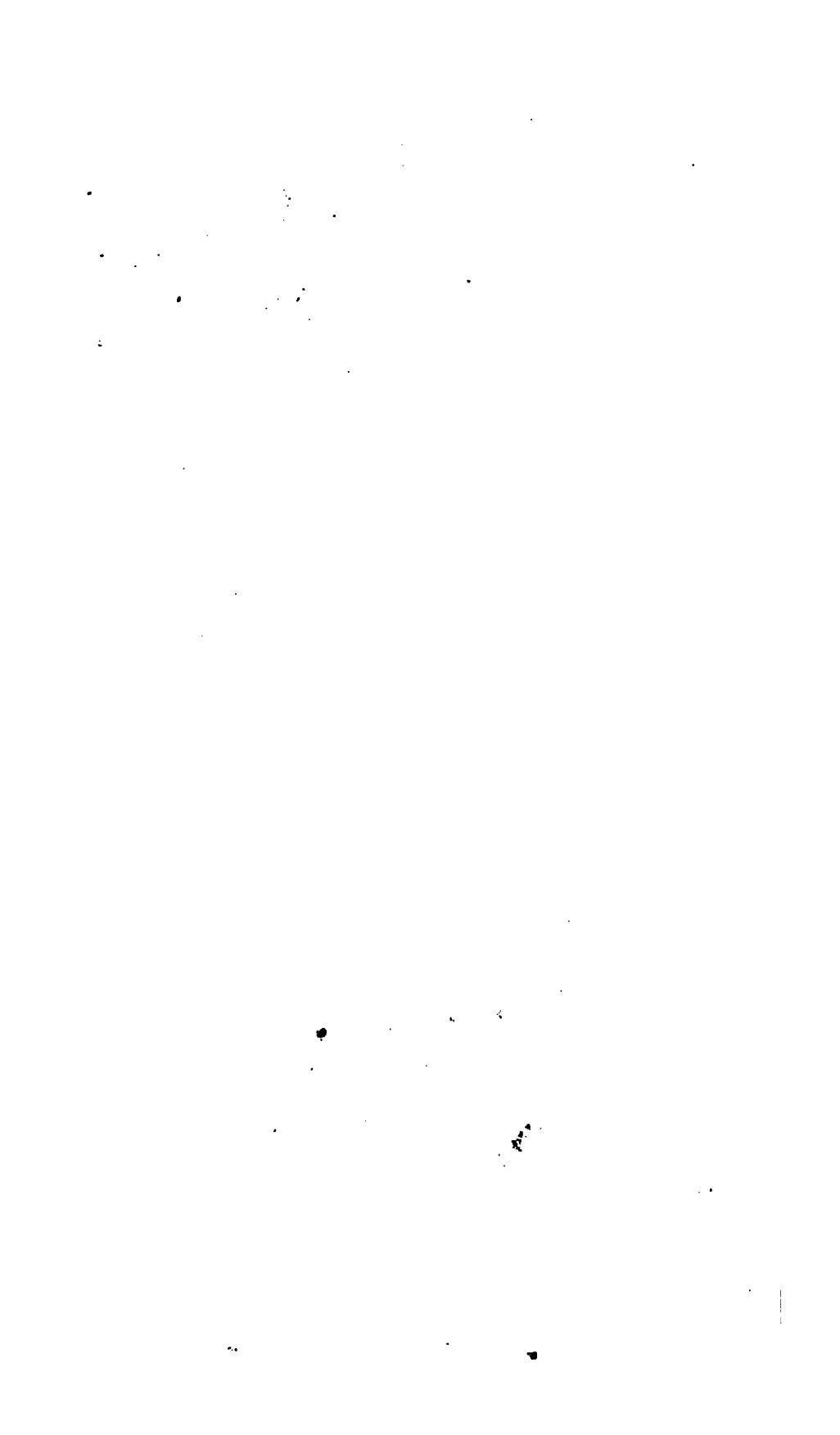
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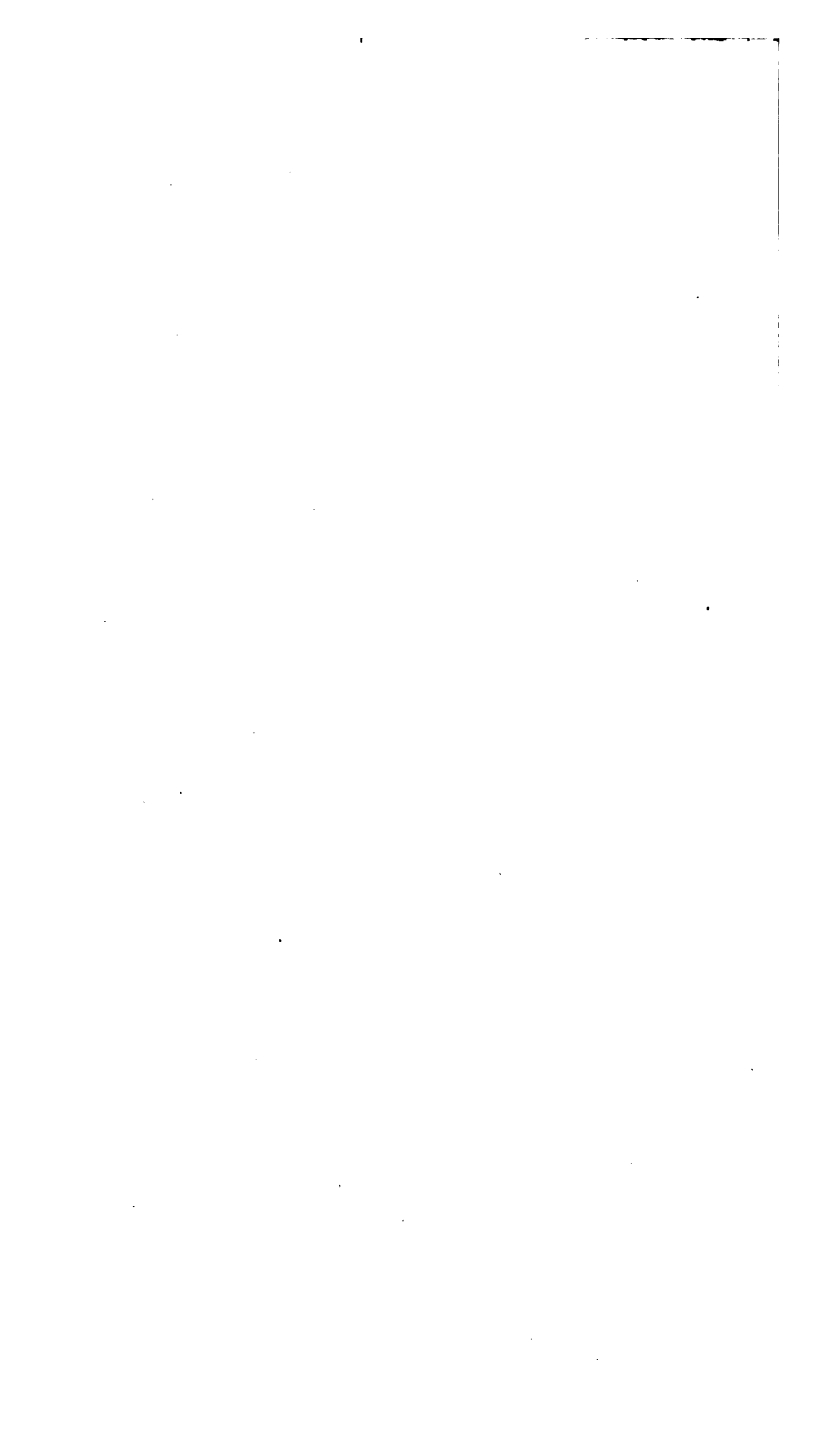
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURT OF THE UNITED STATES

Court of Appeals
FOR THE FIRST CIRCUIT.

By WILLIAM W. STORY,

REPORTER OF THE COURT.

ETIAM, in causis gravioribus, non absque re fuerit, legum præteritarum mutationes, et series consulere et inspicere; ac certe solenne est, antiquitatem præsentibus aspergere.
BACON, *De Aug. Scien.* lib. 8. cap. 3. aph. 63.

VOLUME II.

BOSTON:

CHARLES C. LITTLE AND JAMES BROWN.

1845.

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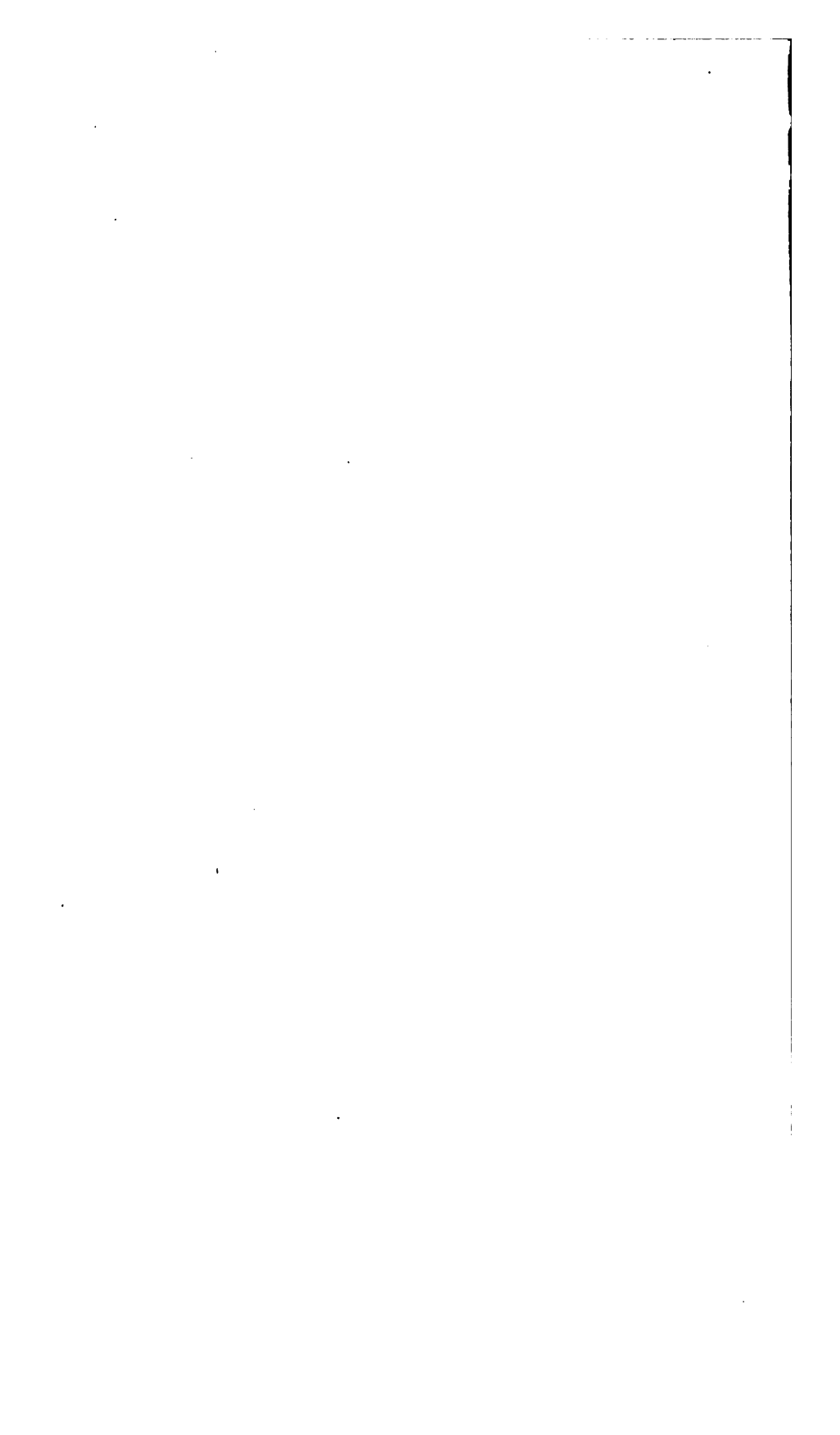
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CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MAINE, MAY TERM, 1837, AT PORTLAND.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. ASHUR WARE, District Judge.

CYRUS S. CLARK v. SAMUEL BURNHAM.

WHERE an agreement was made for the purchase of lands, and the following paper was given,—“*Ellsworth, Dec. 15, 1834. Received of Daniel Burnham and Cyrus S. Clark, one thousand dollars, to be accounted for if they shall furnish me satisfactory security for certain lands on the Naraguagus River, say one hundred and nineteen thousand acres, for one hundred and thirteen thousand dollars, on or before Friday morning next; otherwise to be forfeited. JOHN BLACK.*”—*It was held* to be a sufficient memorandum of the terms of sale, under the Statute of Frauds.

But a parol agreement having been subsequently substituted therefor, by which the said land was transferred, by deed, to other persons than those therein mentioned, and a bill being brought by Clark to recover a certain part from the grantees, as a resulting trust to him; *It was held*, that the written memorandum only created a presumption of a resulting trust, which could be rebutted by proof; and proof being given, that Clark did not advance any portion of the purchase money, as stated in the memorandum; *It was held*, that he was not entitled to a resulting trust, and that the Contract was within the Statute of Frauds.

BILL in equity. The bill, in substance, states, that about December 15th, 1834, Clark and Burnham entered into an informal contract with John Black, agent of the devisees

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named in William Bingham's will, for the purchase of sundry large tracts of land, in different parts of Maine, [particularly described in the bill] for which there was to be paid \$113,000 as nearly as recollected: of which agreement, a memorandum was then made, and signed by said Black, and, by consent of Clark, delivered to Burnham; and which Burnham is called on to produce in Court—by which agreement, Black was to give bond to Clark and Burnham, conditioned to give them a deed or deeds of said lands, on payment of the sum above named; that Clark and Burnham then paid Black \$1000, in equal portions, in part of consideration, the same being to be forfeited, if the contract should not be completed; that, afterwards, about the 19th of said December, it was agreed between Clark and Burnham, that *David Webster* should be interested in the purchase *one half*, Burnham three eighths, and Clark one eighth, in common; but that it was farther arranged and agreed, that the bond or bonds to be given by Black should be conditioned to convey the lands to Burnham and Webster only; and that they should be the obligees; and that, in this manner, Clark's *one eighth* should be secured to Burnham in *trust for Clark*.—That bonds or contracts were accordingly so given by Black to Burnham and Webster, for conveyance of the said lands, on payment, as before mentioned, of the sum of \$113,000, by five instalments; the first of which was payable in 60 days from December 15th, 1834; the second on December 15th, 1835; the third on December 15th, 1836; the fourth on December 15th, 1837, and the fifth on December 15th, 1838.—That in consequence of above agreement and arrangement with Clark, and of his giving up all his interest in the contract, except the one eighth, and the sum of \$500 advanced to Black, Burnham engaged, on request, to assign and transfer to Clark *one eighth* part of his interest in the said contract and lands, and return to Clark the balance of the \$500, after deducting one eighth of the said

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\$1000 paid as aforesaid. That on December 22nd, Clark demanded of Burnham such transfer and assignment, it being before any payment became due; but that he fraudulently refused to do it. That Clark was ready to pay his proportion of the said instalment on receiving such assignment, and of the other instalments, as they should become due.

The Answer was, in substance, as follows :

The defendant first denies, that there was ever any contract in writing between the parties, in relation to the subject-matter of the bill, and pleads the Statute of Frauds in bar. And in support of his said plea, he answers, that some time in the first part of December, 1834, he had some conversation in Portland with one David Webster, touching the purchase of certain lands, which had been previously advertised by Black, and he then and there agreed with Webster to purchase the same in company with him; and then and there farther agreed to go immediately to Ellsworth, and secure the said purchase for himself and Webster, he, (Webster), being obliged to make a previous journey to the forks of the Kennebec, and agreeing to meet the defendant on Thursday, December 18th, and then proceed to Ellsworth, and close the purchase, if the defendant should succeed in securing the same.

That the defendant, accordingly, left Portland on December 12th, and arrived in Bangor on the next day, where he found Clark, with whom he had no previous acquaintance, but whom he knew, by reputation, as a merchant, who had failed in Portland.

That he had a conversation with Clark about the purchase of a tract of land, situated on Hog Bay, in Hancock County, which the defendant thought could be purchased for three thousand dollars.

That Clark proposed to become interested in the said purchase, and that they agreed to examine the said tract, and if it looked well, to purchase together. But that the defendant

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did not then inform Clark of his previous agreement with Webster, not deeming it prudent to inform any one of it, until the purchase should be secured, and intending to avail himself of the Hog Bay purchase afterwards.

That Clark and the defendant then went to Ellsworth in company, and on his arrival, this defendant called on Black, and told him of his and Webster's desire to purchase. It being Sunday, little was said, and the defendant agreed to call on the next day; and on his return to the public house, informed Clark of the same; considering himself now safe, by having so notified Black.

That some conversation then took place between Clark and the defendant about the quality of the lands, and of the defendant's and Webster's chance in making the said purchase; but nothing was then said about Clark's becoming interested; neither did this defendant then think of it, as he had never had it in contemplation to be interested with any one except Webster, and he also knew Clark's inability to engage in so large a speculation.

That on the next day, the defendant called again on Black, and Clark went with him by invitation.

That the defendant then stated to Black his agreement with Webster, and requested the refusal of the lands until Webster's arrival. Black, at first, peremptorily refused; stating, that Webster well knew, that such was not his mode of doing business; that he did not know Burnham; and that, although he knew and had confidence in Webster, yet if he wished to make the purchase, he should have come in person, and closed the bargain at once.

That the defendant and Black then had much conversation in Clark's presence; that the defendant urged Black to give the refusal; and stated the reason why Webster was not present; and that he did not wish the refusal for the purpose of speculating upon it, but for the purpose of purchase; and

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that he offered to deposit with Black one or two thousand dollars, to be forfeited if the lands were not taken by the time specified.

That while this was going on, Clark occasionally made remarks, and put questions about the lands, and also made remarks going to induce Black to give the refusal; his object being, as this defendant supposed, to aid the defendant in obtaining the refusal.

That Black finally consented to take one thousand dollars, as proposed, and to give the defendant the refusal, until the morning of the next Friday; that the defendant then paid to Black one thousand dollars of his own money, and that Black then gave him a written paper, of which the following is a copy, as near as the defendant can recollect:—

“ Ellsworth, Dec. 15, 1834.

“ Received of Daniel Burnham and Cyrus S. Clark, one thousand dollars, to be accounted for, if they shall furnish me satisfactory security for certain lands on the Naraguagus river, say one hundred and nineteen thousand acres, for one hundred and thirteen thousand dollars, on or before Friday morning next; otherwise to be forfeited.

“ JOHN BLACK.”

That, on taking this paper, the defendant noticed the insertion of Clark's name, but did not think it worth his while to object to it, as the money was paid by the defendant, and the paper was in his own possession; and as he was accordingly anxious to secure the refusal, and did not consider the shape or form of the writing to be material.

That after receiving the said writing, the defendant inquired of Black, if he would take some other responsible man in the place of Webster, in case he did not arrive by the time appointed; that the defendant made such inquiry, in order that he might be prepared, in case of any unforeseen

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occurrence, which might prevent the said arrival ; that the defendant named R. M. N. Smyth of Bangor, and that Black expressed his willingness to take him, and also some others named by defendant.

That, after some other conversation, Clark and the defendant returned to their lodgings ; that Clark then inquired whether he could not be interested in the purchase, and said, he thought he could procure some responsible individuals to become interested with him, whose security would be satisfactory to Black ; that the defendant expressed his willingness to let Clark take an interest, if Webster did not arrive ; but if he did, no third partner could be admitted ; but that the defendant should be glad to admit him, if Webster did not arrive, and he, Clark, could procure such security, as would be satisfactory to Black ; as the defendant had no idea of forfeiting his thousand dollars.

That Clark then proposed to pay the defendant five hundred dollars, and to be considered interested in one half if Webster did not arrive ; that the defendant at first refused, as he doubted Clark's ability, and had no doubt that Webster would arrive. But that Clark became urgent, in order that he might be considered as having the first claim in case of Webster's non-arrival, and that the defendant finally consented to take it, on this express condition, that if Webster did arrive, the money was to be returned, and Clark to be considered as no farther interested ; and that Clark accordingly paid the defendant two hundred dollars, and gave him his note on demand for three hundred dollars more, which Clark agreed to pay, as soon as they should arrive in Bangor. In consequence of all which, and of the necessity of immediate action, the Hog Bay speculation was deferred.

That Clark and the defendant then returned to Bangor ; and that Clark, then and there, as he informed defendant, tried to find some responsible individual to become interested,

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and make the cash payment, in case Webster did not arrive ; and that Clark, also, as he told the defendant, tried to procure three hundred dollars, to pay his aforesaid note ; but, as he informed defendant, he entirely failed in both attempts, and did not pay, or offer to pay the note.

That the defendant also tried to find some responsible individual to take Webster's place, in case of his failure to arrive ; but that the defendant was also unsuccessful ; the magnitude of the undertaking, and its uncertainty, deterring all to whom defendant applied.

That on Thursday, Webster did arrive, and expressed his readiness to complete the purchase ; and that Clark then expressed his desire to be interested in some way, and said, that he was unable to purchase any part himself, or to procure any one to do so for him ; but that he desired to have the right of pre-emption in one eighth, and wished the defendant to use his influence with Webster to procure it for him ; that the defendant declined making any agreement with Clark about it, and told him that as Webster had arrived, he, Clark, had no claim on the purchase ; and then offered to repay Clark his money and note, which Clark then declined receiving, stating, that he hoped to make some arrangement by which to become interested ; that he admitted, that he had no claim to any part ; and that the defendant then distinctly told Clark, that he had no wish to have any third person interested with them, and did not think, that Webster had ; but that he finally agreed to sound Webster on the subject.

That the defendant and Webster then went to Ellsworth, and on the way, the defendant hinted to Webster that there were others desirous of becoming interested with them, (one R. M. N. Smyth having also, after the arrival of Webster, expressed his desire to take a share,) but that Webster expressed himself so much averse to it, that the defendant

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dropped the subject, and did not, previous to the completion of the said purchase, mention Clark's name as in any way connected with it.

That on arriving at Ellsworth on Friday, the defendant and Webster notified Black, and received a conveyance of the lands, and some others, for which they gave their joint and several notes, for one hundred and thirteen thousand dollars, divided into five equal payments ; that the said notes were dated December 15, 1834, the first being payable in sixty days, and the residue in one, two, three and four years from date ; that the one thousand dollars advanced by the defendant was indorsed on one of the notes, and that the defendant gave up the receipt aforesaid to Black, returning no copy.

That after completing the said purchase, the defendant and Webster returned to Bangor, where the defendant again saw Clark, who then, to this defendant's astonishment, claimed to be interested in said purchase, by virtue of the insertion of his name in the paper afore described, and of having paid two hundred dollars and given his note for three hundred dollars. But that Clark did not then, or any other time, offer to pay or secure any part of the purchase money of the said lands, or pretend, that he could or would furnish the said security ; that the defendant then told Clark, that neither he nor Webster was willing to admit any other partner, especially one, whose notes would not be acceptable to Black, or of any value in the market ; neither could they give a bond of the lands, as they had given their own notes to a large amount, one fifth part of which must be paid in sixty days, and they relied on making a sale in order to meet said payment ; that the defendant then recapitulated to said Clark all the circumstances of his connection with the transaction, declined admitting him to a share in the purchase, and offered him his note and money, which the said Clark then and there

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received, and this defendant then supposed the whole matter ended, so far as Clark was concerned.

That shortly afterwards, and before the defendant left Bangor, Clark sued this defendant, and claimed to recover five hundred dollars for so much money had and received ; that the defendant employed counsel to defend, but that the said suit was never entered ; and why the said suit was commenced, the defendant could not conceive, except it might be for the purposes of intimidation.

That the defendant and Webster left Bangor on Tuesday, December 23rd, and in the course of the same winter, before the expiration of the sixty days, contracted to sell all their interest in eleven sixteenths of the said purchase ; that before the said sale was completed, the said first payment became due, and was made accordingly, deducting the aforesaid one thousand dollars advanced by the defendant to Black.

That the defendant and Webster were enabled to make the said first payment, by reason of the said contract to sell eleven sixteenths ; that accordingly, on the 19th of February, they completed the said sale ; but that before it was completed, on the same day, the defendant was served with a *subpœna* to appear before Judge Ware, to answer to the said Clark, in a bill in Equity, on Thursday, March 5th, 1835, at which time he appeared, and not being prepared with any evidence, an injunction was granted, restraining the defendant and Webster from selling the remaining five sixteenths.

That this defendant has since understood, and believes, that the said Clark's object, in filing the said bill, was to embarrass the said sale, and force the defendant to a compromise of his inequitable claim, knowing the necessity, under which the defendant and Webster were, of making a sale, in order to make the first payment ; that the defendant has understood and believes, that Clark has repeatedly so declared, — and that the said Clark has, in fact, much vexed and harassed the

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said Webster and the defendant, and prevented their making a sale up to the present time.

That the defendant denies, that any agreement of the purport set forth in the bill, was ever made between the said Clark and the defendant, that Webster should become owner of one half, and the defendant of three eighths, and Clark of one eighth; or that the contract should be in the names of Webster and the defendant alone, and thus one eighth should be secured to the defendant, in trust for Clark; or that it was ever agreed by the defendant, on any consideration, to hold one eighth in trust for Clark; or, at his request, to assign one eighth to him; or that any part of the said five hundred dollars should be deducted, as part pay for the said one eighth; or that there was ever any understanding, express or implied, as to the points above specified between the said Burnham and Clark.

The defendant farther denies, that the said Clark ever demanded any transfer or assignment of the said eighth; or expressed his readiness to make his proportion of any payments, other than is herein before stated; neither does the defendant believe, that the said Clark has ever, at any time, been ready, or able to make said payments, or to give security therefor.

The cause was argued by *P. Mellen* for the plaintiff, and by *W. P. Fessenden* and *Fessenden* for the defendant.

STORY, J. delivered the opinion of the Court in substance as follows: The present bill is not founded upon the original paper or receipt of John Black, given to the Plaintiff and the Defendant, dated on the 18th of December, 1834, and referred to in the bill and answer. Under that contract, if Clark (the Plaintiff) is entitled to any part of the purchase from Black, he is entitled to a moiety, his name being used in that contract as one of the purchasers, and there being no

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other evidence to explain the interest of the purchaser. It has been said, that the receipt so signed by Black, is nothing but a naked receipt, and not a memorandum of any contract for the purchase of the lands. I think otherwise; and that however imperfect in its expressions, it purports to contain a memorandum of the terms of the purchase by Burnham and Clark, viz. the purchase of the lands (119,000 acres) on the Naraguagus River, for the sum of \$113,000, to be received on or before the next Friday. The terms of the instrument are as follows: "*Ellsworth, Dec. 15, 1834. Received of Daniel Burnham and Cyrus S. Clark one thousand dollars, to be accounted for, if they shall furnish me satisfactory security for certain lands on the Naraguagus River, say one hundred and nineteen thousand acres for one hundred and thirteen thousand dollars, on or before Friday morning next; otherwise to be forfeited. JOHN BLACK.*" The money, according to the terms of the memorandum, was plainly to be paid and secured by Burnham and Clark, and the lands were to be conveyed or secured jointly to them upon their complying with the conditions of the contract. But there is the less need to dwell on this point, because it does not constitute the groundwork of the present bill.

The case made by the bill, and for which the Plaintiff now seeks relief, is founded upon a subsequent substituted contract, by which the same lands were to be purchased on the joint account of David Webster and Burnham and Clark, in which Webster was to have one moiety, and Burnham three eighth parts, and Clark one eighth part; and that Clark's share was to be conveyed to Burnham in trust for Clark. The bill seeks from Burnham a conveyance of this one eighth part as a trust for Clark, upon the latter's paying and securing his proportion of the purchase-money. The answer denies, that there ever was any such substituted contract as the bill asserts; and insists on the benefit of the Statute of Frauds.

Cyrus S. Clark v. Samuel Burnham.

It is clear, that the substituted contract was not in writing. It is, therefore, a mere parol contract for the purchase of lands; and open to the objection of being within the Statute of Frauds, unless it constitutes a case of a resulting trust. But is the substituted contract itself sufficiently proved as an absolute, unconditional parol contract, as asserted in the bill? The answer positively denies it. The proofs are not clear to establish it. The most that can be said, is, that there is proof of some loose talk and indeterminate conversations between Burnham and Clark on the subject. It does not appear to me, that the Court can, under such circumstances, say, that the contract itself is sufficiently proved.

But if the substituted contract were sufficiently proved, as a parol contract, it would be within the Statute of Frauds, unless at the time when it was entered into, Clark was entitled to a resulting trust in the lands, in virtue of the original contract of Burnham and himself with Black. Now, that depends upon this; whether any part of the purchase-money of \$1000, paid to Black, belonged to Clark. If it did, then the argument is, that a resulting trust arises by operation of law in favor of Clark to the extent of the share of the purchase-money paid by him. The argument in its general bearing, in cases of joint purchases, is sound; for where lands are purchased with the several funds of two persons, there arises a resulting trust in the land to each, according to his share of the purchase-money, in whosoever name the conveyance may have been taken.¹

The Defendant insists, that he paid one half of the sum of \$1000, which was delivered to Black for the purpose of securing the bargain. Now, the answer denies that any part of the money paid to Black was Clark's, or paid on Clark's account. It admits, however, a conditional agreement after-

¹ See 2 Story on Equity, § 1206, and the cases there cited.

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wards, to let Clark into an interest in the purchase, if Webster would consent ; and that upon this agreement, \$200 was paid in money to Burnham, by Clark, and a note given by him for the remaining \$300. Afterwards the purchase was made exclusively by Burnham and Webster with Black, and they, and they alone, gave their notes and security for the whole purchase-money, in which Clark did not join ; nor had any part in the final negotiation. The \$200 were afterwards repaid by Burnham to Clark, and the note of \$300 was also given up to him.

Now, there is no sufficient proof, that the \$500 was, at the time, paid by, or on account of, Clark : and, taking the whole evidence, it seems to me, that the final bargain for an interest in the land, by Clark, with Burnham, was a subsequent transaction ; and no fixed agreement existed between them at the time, when the money was paid to Black, and the money then paid, was not in any part the money of Clark, but wholly of Burnham. It is true, that the memorandum purports, that the money was paid jointly by Burnham and Clark ; and without that, the Plaintiff would scarcely have any ground to stand upon. But this receipt creates only a presumption of a resulting trust for Clark ; and a resulting trust may always be rebutted by counter parol evidence. Now, in the present case, the answer, which is responsive to the bill, expressly denies, that the money was paid to Black by, or on account of, Clark ; and asserts, that it was all Burnham's own money, and paid upon his own sole account. At all events, the transaction is so obscure and doubtful in its circumstances, that a Court of Equity would not be warranted in pronouncing upon such imperfect materials, that there was a clear resulting trust for Clark. If there was any such trust, it would be in a moiety of the whole purchase then contemplated. Besides ; there is another most important consideration in the case, and that is, that the money was not paid as a part of a

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present fixed bargain between the parties for the land. It was a mere deposit, to be forfeited if the purchase was not finally made, and satisfactory security given for the whole purchase-money (\$113,000), on or before the ensuing Friday morning. Now, it is manifest that Clark never did give any such security; nor did he ever complete, or offer to complete, the bargain with Black; but it was completed exclusively by, and in the names of, Burnham and Webster, who gave their own satisfactory security therefor. Indeed, the whole evidence shows, that at this time Clark was utterly insolvent and had failed; and it is certainly extremely improbable, that Burnham would, under such circumstances, become liable in effect as surety for Clark for half the purchase-money; or that Clark would, as an insolvent debtor, attempt to purchase half the land. And yet this is his statement as to the original contract between Burnham and himself. The other fact is not less significant. Clark actually received back his \$200, and his note for \$300. Why was this done, if he was then understood to be an absolute co-purchaser of any part, much more of a moiety of the land, the purchase being admitted to have been an advantageous bargain? The receipt of the money and the note by Clark certainly furnish strong evidence, under the circumstances, that he either considered the bargain as to himself a conditional one with Burnham, or that he voluntarily waived it upon the ground of his utter inability to furnish satisfactory security for his own part of the purchase-money, or of his consciousness, that he had no claim upon the land, unless Webster would consent to let him in to a participation in the purchase, which Webster refused. The taking back, then, of his money and note by Clark has, or at least may justly have, a twofold operation. 1. As evidence *pro tanto* in support of the allegations in the answer. 2. As evidence of a deliberate waiver of any claim to the enforcement of any right or trust in the land. The bill does not al-

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lege any fraud, or mistake, or surprise, in thus taking back the money and note. If the Plaintiff meant to rely upon such a ground, it was indispensable, that he should have stated it in his bill. So far from doing so, he silently passes over the whole transaction, as if it never had existed. Now, it seems difficult to suppose a case, where a Court of Equity would interfere to help a party who had deliberately waived his right under a contract voluntarily, and without any fraud, or mistake, or surprise. A waiver with full knowledge of all the facts, is, we all know, in many cases a complete defence at law, or a good bar to a defence at law, according to circumstances, where it is voluntarily made. Nay, the doctrine has gone farther, and it has been held, that, if made under a mistake of law with full knowledge of the facts, it binds the party. And Equity in this respect generally follows the law. And here, again, I may repeat, that in such a transaction, so obscure and imperfect in its character and proof, a Court of Equity ought not to act, for the very reason, that the *onus probandi* is on the Plaintiff, and the answer of the Defendant admits no part of the case.

But in reality, the bill proceeds, not upon the original agreement with Black, (for he is no party to the bill, nor is any relief asked or even pretended to exist with him) ; but upon an original parol agreement between Burnham and Clark, which was displaced by another substituted parol agreement between them, in which Clark's interest is reduced from a moiety to an eighth in the land. Now, it seems to me clear, that such an agreement, being for an interest in lands, is within the Statute of Frauds, and should be in writing ; for the Statute applies not only to legal interests, but to Equitable interests and trusts in lands, except resulting trusts. That the present is not a resulting trust has been already stated.

Upon the whole, my judgment is, and the District Judge concurs in it, that the bill must be dismissed with costs.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1841, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. PELEG SPRAGUE, District Judge.

THE CITIZENS BANK

v.

THE NANTUCKET STEAM-BOAT COMPANY.

THE transportation of passengers, or of merchandise, by common carriers, does not necessarily imply, that the owners are not common carriers of bank notes or specie. The nature and extent of that employment or business which the owners expressly or impliedly hold themselves out as undertaking, furnishes the limits of their rights, duties, obligations and liabilities.

No person is a common carrier, in the sense of the law, who is not a carrier for hire. It is not necessary, that the compensation should be a fixed sum; it is sufficient if it be in the nature of a *quantum meruit*, enuring to the benefit of the owners. Nor is it necessary, that the goods or property should be entered upon a freight list, or the contract be verified by any written memorandum; although both may be important ingredients in ascertaining the true understanding of the parties, as to the character of the bailment.

Where, in answer to a cross interrogatory, proposed by counsel in a deposition, as to whether the witness had received a release from all liabilities, the witness produced the release from his own possession, as a part of his testimony; it was held, that he need not prove the execution of the release by the subscribing witness. And the question having been asked

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by the respondents, in order to establish the competency of the party as their own witness, they were estopped from denying it.

But in the case of a release, produced by a party to a suit, to establish his own title he must prove its due execution by the subscribing witness.

A release of all actions and causes of action, or of a particular cause of action, which has happened before the time of the release, will discharge the witness from all liability, dependent upon the event of the suit, in which he is called to testify, touching his conduct in the matters on which the suit is founded.

Quære.—Whether usages and customs can be introduced as evidence to control the construction of contracts, and the principles of law.

Where a certain charter, incorporating the Nantucket Steam-boat Company, granted a right to run a steam-boat "for the transportation of merchandise," and the master thereof, being intrusted with a certain sum of money in bank bills, lost it, or never duly delivered it; *It was held*, that the term "merchandise" does not apply to mere evidences of value, such as notes, bills, checks, policies of insurance, and bills of lading, but only to articles having an intrinsic value, in bulk, weight, or measure, and which are bought and sold; and that, in order to render the Company liable, it must be clearly proved, that they had held themselves out to the public as common carriers of bank-bills for hire; and that they had authorized the master to contract on their account and not on his own, for the carriage thereof, which in the present case was not established by proof.

It was also held, that the *onus probandi* was upon the libellants to make out a *prima facie* case, in the affirmative; and then the *onus probandi* of displacing this inference was shifted upon the Respondents.

The knowledge of the owners, that the master carried the money for hire, would not affect them, unless the hire was on their account, or unless the master held himself out as their agent in that business, within the scope of the usual employment and service of the steam-boat.

Proceedings *in Rem* and *in Personam* cannot be blended in one libel.

LIBEL in the Admiralty. The libel states in substance as follows:

That on or about the 22d day of October, last past, the libellants were the owners of a certain package, containing a large number of bank bills, issued by the President, Directors and Company of the Pacific Bank, in Nantucket, the particular denominations of which the libellants are unable to set forth, but the whole sum and amount whereof was \$1600, of the lawful money of the United States of America, and, also,

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containing a check drawn by the cashier of the said Pacific Bank on the President, Directors, and Co. of the New England Bank, a banking corporation duly established by law in the state of Massachusetts, for the sum of \$422, which said package was directed to J. B. Congdon, Esq., cashier of the Merchants Bank, New Bedford ;

That the respondents were the owners of a certain steamboat called the Telegraph, whereof Lot Phinney was master, which said steamboat was then, and had been for some time, employed in carrying passengers and freight from the Island of Nantucket to the main land of Massachusetts, and particularly to the town of New Bedford ;

That the libellants by their cashier, Mr. Starbuck, delivered the said package to the said Phinney, to be carried by and on board the said steamboat from Nantucket to New Bedford aforesaid, and there to be delivered, the dangers of the seas excepted, to the said Congdon, for a certain reasonable freight, to be paid therefor ; and the said master thereupon accepted the said package, and understood and agreed, that the same should be carried and delivered as aforesaid, or else, as the libellants aver, the said package was delivered as aforesaid to the respondents, through the said master, to be, by the said respondents, transported and delivered as aforesaid ; all dangers and accidents and losses excepted, save such as should arise from want of ordinary care on the part of the said respondents or their agents ;

That the said respondents never did deliver the said package or any of the contents thereof to the said J. B. Congdon, or to any other person at New Bedford aforesaid, or elsewhere, for the use of the said libellants, but through want of ordinary care did lose the same ;

That by reason of the premises, the libellants have wholly lost and been unlawfully deprived of the said package and the contents thereof, and of all benefit and advantage there-

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from, and have suffered damage to the extent of \$1600, for which the respondents are liable, and ought justly to pay to the libellants.

The libel concludes with a prayer for the allowance of the said damages and for general relief.

The Answer denies any knowledge on the part of the respondents, that the libellants were the owners of the package, as alleged, and of the contents of the package, or that the said package was delivered to Lot Phinney, in the manner and for the purpose alleged, or that the package, if so delivered to him, was not by him safely carried and delivered, as is alleged, or that the libellants have suffered any loss, or the respondents incurred any liability as alleged.

The answer goes on to allege that the libellants, and other corporations and persons in Nantucket and New Bedford, have frequently, as these respondents have been informed and believe, delivered sums of money or packages of bank bills to the said Phinney, to be by him carried, as their agent and for their accommodation, to and from the said places, for the purpose of making payments and deposits, and of other mercantile transactions, but that the said packages were not so delivered to or received by the said Phinney, in his capacity of master of the said boat, nor as within the scope or course of any business, which he was authorized to transact, as such master, and were not delivered to him, and received by him, to be carried for any stipulated or implied hire or reward, to be paid to him or to the owners of the said boat, but were so received and delivered for the accommodation of the said corporation and persons; that if any compensation was made to the said Phinney, it was made as a gratuity or voluntary donation for his private and personal benefit, and not as stipulated or agreed reward or hire; that these respondents have never authorized directly or indirectly the said Phinney to carry on such transactions on their account and risk, and in

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their behalf, and have never received any payment, hire or reward for such services, as will appear by their book of accounts, which is submitted for examination ; and that such services were in behalf of the persons sending such packages, and of the libellants in the case alleged, as their agent and servant, and not as the agent and servant of the respondents ; that the said Phinney had no authority to enter into any such contract to carry and deliver such packages as is set forth in the libel, in behalf of these respondents, and that they have never received any reward therefor, nor has any been tendered to them or to any one as their agent ; but that the same, if received and carried by the said Phinney, was received by him to be carried on his own individual risk and responsibility, and not on the risk and responsibility of these respondents ;

That from the insulated position of the community, it has been necessary to send at all times money by water-conveyance a portion of the distance to the various places with which they have business connexions, and that packages of money have been, for a long period of time, conveyed by packet masters, without receiving compensation.

The cause came on to a hearing in the District Court upon the libel and other pleadings, and evidence in the case ; and the late district judge, (Judge Davis), upon the hearing in January, 1840, dismissed the libel with costs. From the decree of dismissal an appeal was taken by the libellants to the Circuit Court.

The cause was now elaborately argued by *C. P. Curtis* for the libellants and by *Francis C. Loring* for the defendants.

C. P. Curtis for the libellants. — The respondents are common carriers. The charter incorporating this Steamboat Co. (Stat. 1833, ch. 11), grants to sundry persons the authority to run a steamboat and two other vessels, for the convenience

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of the public travel and the transportation of merchandise, between Nantucket and New Bedford.

The respondents do not aver, that the Company have not the right to carry bank bills or specie as freight, but only, that the libellants and others have sent packages of bills by Phinney as their agent, and not as master of the vessel, and that the respondents have never authorized Phinney to carry money in their behalf, nor have received any compensation for so doing.

The respondents cannot argue, (as they have not so averred), that the property sent by the libellants was not such property as they might legally carry; and if they could, such would not be a true construction of the charter.

Specie and bank notes come within the definition of merchandise, "any thing to be bought or sold." By the Revised Statutes, ch. 97, p. 21, bank notes may be taken in execution and sold like other chattels. So in New York, *Handy v. Dobbin* (12 Johns. 220), a policy of insurance on "property" covers bank bills. *Whiton v. Old Colony Insurance Co.* (2 Metcalf 1, ch. 7). Shaw C. J. says in 20 Pick. R. 9, 13, "the word merchandise is broad enough to cover stocks or shares in incorporated companies;" and the same Court decided in another case, that the sale of such shares was within the statute of frauds. *Tisdale v. Harris* (20 Pick). *Bona et catalla* include *choses in action*. *Calye's Case* (8 Co. 63). In *Allen v. Sewall* (2 Wend. 327), it was decided by the Supreme Court, and afterwards by Chancellor Walworth, that bank notes came within the words "goods, wares, and merchandise," and judgment was given against the defendants. The Court of Errors, however, (6 Wend. 335,) overruled the decision, it appearing, that the master had been forbidden by his employers to carry bank bills.

There may be common carriers of bank bills, as well as of any other species of property. *Kemp v. Coughtry* (11 Johns.

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109); *Dwight v. Brewster* (1 Pick. 50). And there is nothing in the present charter to prohibit the respondents from carrying bank bills, either gratuitously or for compensation. It is not necessary, in order to charge a person as a common carrier, to prove that a specific sum was agreed on for the hire; for if none is agreed on, he is entitled to a reasonable compensation. Story on Bail. 505; 6 Wend. 350. And common carriers are liable for property lost or destroyed by gross negligence, even where they carry it without hire. *Foster v. Essex Bank* (17 Mass. R. 498).

Common carriers are responsible for the acts of their servants and agents, and any arrangements with them, whereby they may receive exclusively the compensation for the carriage of particular packages, will not exempt the carrier from responsibility for loss, unless it be known to the party, when it may be deemed that he contracts exclusively with the servant or agent. *Tracy v. Wood* (3 Mason, 132); Story on Bailments, 507.

Where the master of a vessel is consignee of the goods to sell them, and it is the course or usage of trade for the master to receive, on behalf of the owner, a compensation, which is divisible between the owner and master, by private agreement, the owner is responsible. Story on Bailments, 546; *Emery v. Hersey* (4 Greenl. 407); *Kemp v. Coughtry* (11 Johns. 107).

The freight of the cargo is the compensation for the whole duty performed. 2 Kent, 609, (3d ed.). *Kemp v. Coughtry* (11 Johns. 10).

So, if the master of a vessel, who is the agent of the owners, receive the property of another to be carried in his vessel, the owners are bound by his contract, unless they can prove that his authority was limited, and that it was known to be so to the other party. *Ward v. Green* (6 Cowen, 173); 1 Bell's Comm. No. 432 (2); 2 Kent, 609 (3d ed.); Story

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on Agency, 119; *The Rebecca* (Ware, R. 194); *The Phæbe* (Ware, R. 247, 8).

It is the duty of the carriers to take the utmost care of the goods; to make a right delivery of the property, according to the usage of trade, or the course of business; and to expose the property to no unnecessary hazard. Story on Bailments, 327, 509, 543. And the *onus probandi* is on the carrier to exempt himself from liability, (Story on Bailments, 529), which attaches from the time of his acceptance of the goods, and does not cease until no duty remains to be done by him. Story on Bailments, 533, 538.

Where there is no fraud or intentional concealment of the value of the parcel, the carrier is responsible for the whole value, unless he bring home to the other party notice of the limitation of the carrier's authority.

In the present case, Capt. Phinney is the master of a steam-boat established expressly for a carrier. The cashier of a bank delivers to him parcels to be delivered to another cashier. He knows from the course of dealing, and also from his being paid for carrying them, that the parcels contain money and valuables. He asks no questions as to value, and prescribes no limits to his responsibility; and various small sums are paid to him, as the cashier testifies, by way of freight.

No notice of any private instructions of his employers is brought home to the libellants or their cashier; nor does it appear there were any such, forbidding him to take money, although it is matter of notoriety that he carries such packages for pecuniary reward. A parcel is lost by gross carelessness of the master; for what could be more so, than for the carrier or his servant to hang his coat, containing a package of bank notes, on a chair, and to go to bed and to sleep, in another room, in a house filled with people, some of whom were strangers? *Tracy v. Wood* (3 Mason 132). Why did he

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not carry it to Mr. Congdon's house, if the bank was closed? But Phinney declared, that he did not *think* of the package after leaving the bank till the next morning.

What is the ground of defence against this claim? 1st: A general denial of the delivery of the parcel to Phinney, of its contents, and of its loss by him, all of which we have proved.

2d: That the libellants delivered their parcel (if at all) to Phinney, as *their* agent, and not as the servant or agent of the owners (respondents). This we deny.

Phinney was and had been for a considerable time in the open and notorious command of the boat, with all the usual powers of master. No limitation or restriction of the common authority of the master of a carrying vessel was prescribed by his owners, and his contracts have the same effect in law as if they were the personal acts of the owners. *Phæbe* (Ware, R. 268). The property was delivered on board the respondent's vessel, to the respondent's servant, who was the master of said vessel. It was carried in *their* vessel. Whatever time was occupied by Phinney in transacting the business was *their* time, for the whole time of the master is due to the owners. Abbott on Shipping, p. 132.

It was delivered under a contract to pay for the transportation. Mr. Starbuck swears to this positively, and that when he first sent packages of money he did not know Phinney by sight; he was a stranger to him.

But if no specific compensation had been expected, to obtain the freight of other merchandise was the object in view, and this was the motive of the directors in permitting their master to carry small packages without particular charge of freight; and this was a sufficient consideration on their part. This case closely resembles that of *Foster v. The Essex Bank* (17 Mass. R. 498), which was to recover the value of a special deposit of specie, taken without reward. The Court say, "As the building and vaults of the com-

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pany were allowed to be used for this purpose, and their officers employed in receiving into custody the things deposited, the corporation must be considered as the depository, and not the cashier or other officer, through whose peculiar agency commodities may have been received into the bank."

There, the bank derived *no benefit* whatever from the deposit, yet were holden to be liable for any loss arising from gross negligence. Here the Steamboat Company obtained the benefit derived from the freight of the merchandise of the directors and principal owners of the bank; for if the respondents had refused to carry bank bills, &c. for the bank, they would have lost the carriage of their merchandise. The capacity in which Phinney received the package was as master of the boat, and therefore as agent of the owners, and they were bound to give notice if they meant to limit his authority. There was not a syllable of his receiving it in any other capacity.

If Starbuck, when he first sent money by him, did not even know him by sight, why should he trust him personally? It is incredible, that the cashier should confide a large sum of money to a stranger, unless he relied on his official character as agent and servant of the respondents.

The contract of the respondents was that of common carriers, and carriers are liable for every species of loss, except such as are caused by inevitable accidents or by the public enemies.

This rule is enforced in the case of a steamboat, grounding by mistaking a light in another vessel for a light-house. *McArthur v. Sears* (21 Wend. 190).

The case at bar is almost exactly like the case of *Allen v. Sevall* (2 Wend. 327).

But the respondents attempt to set up a usage, by which the master of their boat is to be deemed the agent of the

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bailors, and not of the Steamboat Company. There is no evidence in this case sufficient to establish a certain and uniform usage by the respondents to carry packages without making themselves responsible for them, in case of loss. Such a usage cannot be determined by the opinion of witnesses, but must be established by instances. *Winthrop v. Union Insurance Co.* (2 Wash. C. C. R. 7); *Cunningham v. Fonblanque* (6 Car. & P. 44; 2 Burr, 1228); *Savil v. Blanchard* (4 Esp. N. P. 6, 53). And such a usage cannot be sustained in opposition to established principles of law. *Hommer v. Dorr* (10 Mass. 26); *The Reeside* (2 Sumner, 567).

There is no evidence here to establish any certain and uniform usage to carry money without compensation and without the carriers making themselves accountable for it: *Wood v. Wood* (1 Car. & P. 59; 7 C. & P. 711); *Bleaden v. Hancock* (4 Car. & P. 152). To exempt themselves, they must also prove a usage *not to pay for such property, if lost*. 22 Pick. R. 108. The burthen of proof is on the respondents to establish *the entire usage*. Not a single instance of loss by the respondents is shown; if the previous practice of the packet masters is admitted, only two instances are shown, in all time; one was by shipwreck, the other by theft; and this last was of a sum of money received by the master for goods sold by him as agent of the shipper.

F. C. Loring, for the respondents. — On the evidence, the matters in dispute are the nature of the contract, and the parties to it, and the question of negligence. To make the respondents liable as carriers, the libellants must prove a delivery of the package to the master of the boat, as the agent of the respondents, and that it was to be carried for hire.

The proof of a special contract is not made out, and is contradicted by the evidence in the case.

The libellants then resort to the presumptions arising from the facts, that the respondents were owners of the boat, — the master their servant: viz. that the package was received

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by him to be carried as their agent, and for a reasonable compensation.

Their own evidence does not make out such a case. For it appears, that it was not the usual business of the boat to carry packages of money for hire, and there is no proof of any authority in the master so to do. It also appears, that, for many years, the libellants have been in the habit of sending packages of this kind by the boat, and that the whole amount paid by them as a compensation or gratuity to the master is \$13. The entire inadequacy of this sum, considered as a compensation for the trouble of carrying these packages, and the assumption of the risks of common carriers, shows, that neither party could have considered the contract as of that nature.

If this ground fails, the libellants must resort to the contract of mandate, and show, that the respondents were the mandataries, and that there was gross negligence. The respondents admit, that the contract was a mandate, but deny, that they were parties to it, and that there was such negligence.

All the elements of a mandate are here to be found. 1st. The thing to be done, to wit, the carriage, and delivery of the package: 2d, that the contract was gratuitous: 3d, that the parties to it, to wit, the libellants and the master of the boat, voluntarily entered into it. To prove these positions, and that the master was the mandatary, and the respondents were not parties to the contract, they offer proof of former transactions between the libellants and the present and former master of the boat, and of the constant practice and usage at Nantucket, existing ever since its settlement, in relation to the carriage of similar packages.

It is not attempted to show that the law or liability of carriers, or mandataries, is different at Nantucket from what it is elsewhere, but only to ascertain what was the nature and extent of the contract, and the meaning of the parties, from the

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prevailing usage, and their former dealings in the absence of an express contract; and for that purpose, evidence of usage is always admissible. The *Paragon* (Ware, Rep. 328). The *Reeside* (2 Sumner, 569).

If it can be shown, that the masters of this boat, and of vessels belonging to Nantucket, have been for many years in the constant practice of rendering such services gratuitously, and that this service was rendered in the usual manner, the presumption then arises, that this service was performed gratuitously, and not for hire.

There can be no *quantum meruit* in such a case; for that arises by implication of law, where there is no contract; such a custom would make a contract. If the master had been in the habit of carrying such packages for hire, he might recover in a *quantum meruit*; but not if his practice were otherwise, and he had made no special contract for hire.

The evidence shows, that it has been the daily practice of merchants, banks, and persons generally, at Nantucket, to send packages of bills to the main land by the masters of boats and vessels for many years; that no compensation is ever demanded for this service; that frequently other services, such as the payment of notes or bills, the settlement of accounts, (certainly no part of the duties of common carriers), are required; that no compensation is usually given; and when made, is given to the master, and intended, either to cover expenses incurred or as an acknowledgment to him personally for a favor rendered; that the owners of the vessel never received any compensation; and that this practice is universally known and understood at Nantucket: but that whenever a receipt was required, which was very unusual, and was imagined to impose an additional degree of responsibility, a commission was charged.

If this evidence shows the contract to have been a mandate, the next inquiry is, who was the mandatary? If the respondents, it is only because the master was for certain purposes

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their agent. The presumption arising from this fact may be rebutted by proof, that the agent, in making this contract, was not acting in the scope of his authority, or that the bailor contracted with him personally.

This inquiry, as to the bailor, is equally material, whether the contract is to be considered as a bailment for hire, or as a mandate. If it was a mandate, it would seem to be a necessary conclusion, that the master was the bailee, and not the owners. For it would be unreasonable to suppose, that they employed and paid him to do friendly acts for his neighbors. The presumption, that he was acting in the scope of his business, which was to carry freight and passengers for hire, could not arise in relation to acts from which the owners derived no advantage.

If it was a bailment for hire, the owners would not be responsible, if it appears, that they never authorized the master to carry packages of money for hire, and that the libellants knew so; or that they allowed him to retain whatever compensation was given to his own use, and that the libellants knew so; for then the contract was made with him and not with them.

1st. The charter of the respondents (Stat. 26 Jan. 1833, chap. 11), gives them no authority to engage in the carriage of such packages either gratuitously or for hire.

The charter is granted "for the convenience of public travel, and transportation of merchandise."

Bank bills are in no sense merchandise. The custom of carrying bills gratuitously existed long before the charter was granted, was known to the corporators, and probably considered in framing the charter. It was known, that this custom was of great importance to the islanders; that such packages could not be carried as freight, except at rates, which would cover the the risks of guaranty and insurance; and that the transportation of them on such terms would be of no pub-

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lic advantage. They, therefore, never intended to be carriers of bank bills, and confined their powers to the carriage of merchandise.

There is no proof of any authority to the master to carry such packages for the owners; and no presumption can arise of any, when their business is limited by law in such manner as not to permit of it. The presumption is, that they conformed to the law, and the charter is constructive notice to the public of the limitation of the powers and business of the corporation.

2d. If the proof be, that whatever compensation was given, was intended for and received by the master to his own use, it follows, that he was the bailee. If the contract were a bailment for hire, this conclusion is necessary, because the carrier is liable only in consequence of his reward: if a mandate, then the person to whom the gratification was made was the mandatary, conferring the obligation of which the gratification was the acknowledgment.

That the obtaining of freight was not an inducement to carry these packages gratuitously, appears from the evidence, that they were carried indiscriminately for every one, whether likely to furnish freight, or not; that the freighting business is almost exclusively in the hands of the respondents, so that they are not in danger from competition; and that the withdrawal of their supposed liability as carriers, or as mandatories of these packages, could not affect their other business, is obvious, because all the witnesses, except Starbuck, say, that it never was imagined, that the respondents incurred any responsibility for them.

The proof is conclusive, that the respondents never received any advantage or pay, for the carriage of such packages; that the compensation sometimes made to the master was so trifling, and so seldom given, that it could not affect the rates of wages required by him; and that it was always intended

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for him : and not one witness can be found to testify otherwise.

It is not pretended, that the respondents were direct parties to this contract, and it is proved, that it was not in the scope of their business, and that they derived no benefit from it ; therefore, they are not the bailees. It is proved, that compensation was made very infrequently, and for other services, as well as the carriage and delivery of the packages, and that when made it bore no proportion to the risks assumed by common carriers, and was intended as a gratuity to the master ; and that when any additional liability was supposed to be assumed, as by giving a receipt, a commission was charged, which was never done otherwise ; and that the carriage of these packages, in this way, was a matter of most frequent occurrence, and no instance is known in which a master had refused to carry one gratuitously.

The contract was, therefore, not a bailment for hire, but a mandate, and the master the mandatary.

The fact, that compensation was occasionally given does not affect the nature of the contract, if not given or claimed as a debt ; nor would it be, if expected as a matter of course, if it could not be recovered at law.

The evidence as to the loss does not show such a case of gross negligence as to make a mandatary liable. Story on Bailments, *passim*. *United States v. Duval*, (Gilpin's Rep. 372) ; *Davis v. A. Newling*, (Gilpin's Rep. 486) ; *The Rebecca*, (Ware's Rep. 188) ; *Halsey v. Brown*, (3 Day, 346) ; Story's Conflict of Laws, 226 ; *Trott v. Wood*, (1 Gallison, R. 443) ; *Renner v. Bank of Columbia*, (9 Wheaton) ; *Allen v. Sewall*, (2 Wendell, 341) ; *S. C.* (6 Wendell, 350) ; *King v. Lenox*, (19 Johnson, 235) ; *Walter v. Brewer*, (11 Mass. 99) ; *Reynolds v. Tappan*, (15 Mass. 370) ; *Butler v. Basing*, (3 Car. and P. 613) ; *Tracy v. Wood*, (3 Mason) ; *The Rendsberg*, (6 Rob. 142) ; *Foster v. Essex Bank*, (17 Mass.)

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STORY J. This cause has come before the Court under circumstances, involving some points of the first impression here, if not of entire novelty ; and it has been elaborately argued by the counsel on each side on all the matters of law, as well as of fact, involved in the controversy. I have given them all the attention, both at the argument and since, which their importance has demanded, and shall now proceed to deliver my own judgment.

The suit is in substance brought to recover from the Steam-boat Company a sum of money, in bank bills and accounts, belonging to the Citizens' Bank, which was intrusted by the cashier of the bank to the master of the steamboat, to be carried in the steamboat from the Island of Nantucket to the port of New Bedford, across the intermediate sea, which money has been lost, and never duly delivered by the master. The place where, and the circumstances under which it was lost, do not appear distinctly in the evidence ; and are no otherwise ascertained, than by the statement of the master, who has alleged that the money was lost by him after his arrival at New Bedford, or was stolen from him ; but exactly how and at what time he does not know. The libel is not *in rem*, but *in personam*, against the Steam Boat Company alone ; and no question is made, (and in my judgment there is no just ground for any such question), that the cause is a case of admiralty and maritime jurisdiction in the sense of the Constitution of the United States, of which the District Court had full jurisdiction ; and, therefore, it is properly to be entertained by this Court upon the appeal.

There are some preliminary considerations suggested at the argument, which it may be well to dispose of, before we consider those, which constitute the main points of the controversy. In the first place, there is no manner of doubt, that steamboats, like other vessels, may be employed as common carriers, and when so employed their owners are liable for all

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losses and damages to goods and other property intrusted to them as common carriers to the same extent and in the same manner, as any other common carriers by sea. But whether they are so, depends entirely upon the nature and extent of the employment of the steamboat, either express or implied, which is authorized by the owners. A steamboat may be employed, although I presume it is rarely the case, solely in the transportation of passengers; and then the liability is incurred only to the extent of the common rights, duties and obligations of carrier vessels of passengers by sea, and carrier vehicles of passengers on land; or they may be employed solely in the transportation of goods and merchandise, and then, like other carriers of the like character at sea and on land, they are bound to the common duties, obligations and liabilities of common carriers. Or the employment may be limited to the mere carriage of particular kinds of property and goods; and when this is so, and the fact is known and avowed, the owners will not be liable as common carriers for any other goods or property intrusted to their agents without their consent. The transportation of passengers or of merchandise, or of both, does not necessarily imply, that the owners hold themselves out as common carriers of money or bank bills. It has never been imagined, I presume, that the owners of a ferry boat, whose ordinary employment is merely to carry passengers and their luggage, would be liable for the loss of money intrusted for carriage to the boatmen or other servants of the owners, where the latter had no knowledge thereof, and received no compensation therefor. In like manner the owners of stage-coaches, whose ordinary employment is limited to the transportation of passengers and their luggage, would not be liable for parcels of goods or merchandise intrusted to the boatman employed by them to be carried from one place to another on their route, where the owners receive no compensation therefor, and did not hold themselves out as common carriers of such

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parcels. *A fortiori*, they would not be liable for the carriage of parcels of money, or bank bills, under the like circumstances. So, if money should be intrusted to a common wagoner not authorized to receive it by the ordinary business of his employers and owners, at their risk, I apprehend, that they would not be liable for the loss thereof as common carriers, any more than they would be for an injury done by his negligence, to a passenger, whom he had casually taken up on the road. In all these cases, the nature and extent of the employment or business, which is authorized by the owners on their own account and at their own risk, and which either expressly or impliedly they hold themselves out as undertaking, furnishes the true limits of their rights, obligations, duties and liabilities. The question, therefore, in all cases of this sort is, what are the true nature and extent of the employment and business, in which the owners hold themselves out to the public as engaged. They may undertake to be common carriers of passengers, and of goods and merchandise, and of money; or, they may limit their employment and business to the carriage of any one or more of these particular matters. Our steamboats are ordinarily employed, I believe, in the carriage, not merely of passengers, but of goods and merchandise, including specie, on freight; and in such cases the owners will incur the liabilities of common carriers as to all such matters within the scope of their employment and business. But in respect to the carriage of bank bills, perhaps very different usages do, or at least may, prevail in different routes, and different ports. But, at all events, I do not see, how the Court can judicially say, that steamboat owners are either necessarily or ordinarily to be deemed, in all cases, common carriers, not only of passengers, but of goods and merchandise and money on the usual voyages and routes of their steamboats; but the nature and extent of the employment and business thereof must be established as a matter of fact by suitable

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proofs in each particular case. Such proofs have, therefore, been very properly resorted to upon the present occasion.

In the next place, I take it to be exceedingly clear, that no person is a common carrier in the sense of the law, who is not a carrier for hire; that is, who does not receive, or is not entitled to receive, any recompense for his services. The known definition of a common carrier, in all our books, fully establishes this result. If no hire or recompense is payable *ex debito justitiæ*, but something is bestowed as a mere gratuity or voluntary gift, then, although the party may transport either persons or property, he is not in the sense of the law a common carrier; but he is a mere mandatary, or gratuitous bailee; and of course his rights, duties and liabilities are of a very different nature and character from those of a common carrier. In the present case, therefore, it is a very important inquiry, whether in point of fact the respondents were carriers of money and bank notes and checks for hire or recompense, or not. I agree, that it is not necessary, that the compensation should be a fixed sum, or known as freight; for it will be sufficient if a hire or recompense is to be paid for the service, in the nature of a *quantum meruit*, to or for the benefit of the Company. And I farther agree, that it is by no means necessary, that if a hire or freight is to be paid, the goods or merchandise or money or other property should be entered upon any freight list, or the contract be verified by any written memorandum. But the existence or non-existence of such circumstances may nevertheless be very important ingredients in ascertaining, what the true understanding of the parties is, as to the character of the bailment.

In the next place, if it should turn out, that the Steamboat Company are not to be deemed common carriers of money and bank bills; still, if the master was authorized to receive money and bank bills as their agent, to be transported from one port of the route of the steamboat to another at their risk,

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as gratuitous bailees, or mandataries, and he has been guilty of gross negligence in the performance of his duty, whereby the money or bank bills have been lost, the Company are undoubtedly liable therefor, unless such transportation be beyond the scope of their charter ; upon the plain ground, that they are responsible for the gross negligence of their agents within the scope of their employment.

Having stated these preliminary doctrines, which seem necessary to a just understanding of the case, we may now proceed to a direct consideration of the merits of the present controversy. And in my judgment, although there are several principles of law involved in it, yet it mainly turns upon a matter of fact, namely, whether the Steamboat Company were, or held themselves out to the public to be, common carriers of money and bank bills, as well as of passengers and goods and merchandises, in the strict sense of the latter terms ; or the employment of the steamboat was, so far as the Company are concerned, limited to the mere transportation of passengers and goods and merchandises on freight or for hire ; and money and bank bills, although known to the Company to be carried by the master, were treated by them, as a mere personal trust in the master by the owners of the money and bank bills, as their private agent, and for which the Company never held themselves out to the public as responsible, or as being within the scope of their employment and business as carriers.

The question has been made at the bar, upon whom in this case the burthen of proof lies to establish, that the Company were common carriers of money or bank bills, or not. It does not appear to me to be of any great importance in the actual posture of the present case, how that matter is decided. But I have no doubt, that the *onus probandi* is upon the libellants to establish the affirmative ; for until that is done, no liability can attach to the respondents ; and the

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libellants are bound to establish a *primâ facie* case; and indeed it is scarcely within the rules of evidence to call upon the respondents to establish the negative. But it seems to me the less necessary to sift this matter, since the evidence on the part of the libellants is in my judgment sufficient to establish such a *primâ facie* case, at least to the extent of a compliance with the exigency of the rule.

It is abundantly proved, that the masters of the steamboat have been constantly and habitually employed in the transportation of money and bank bills for banks and private persons (as indeed common packet masters were likewise employed long before steamboats existed) upon this very route, and upon the common routes from Nantucket to other ports. This usage, or practice, or employment, (call it which we may), was so notorious, that it must be presumed to be known to the Steamboat Company; and indeed, that fact is not controverted. Under such circumstances the natural inference would be, that the transportation of money and bank bills was within the scope of the usual employment of the master in his official capacity, and on account and at the risk of the owners, unless the inference were repelled by other circumstances. The *onus probandi* then, of disproving this inference, may be deemed to be fairly shifted upon the respondents.

The ground of the defence of the Company is, that in point of fact, although the transportation of money and bank bills by the master was well known to them, yet it constituted no part of their own business or employment; that they never were in fact common carriers of money or bank bills; that they never held themselves out to the public as such, and never received any compensation therefor; that the master in receiving and transporting money and bank bills acted as the mere private agent of the particular parties, who intrusted the same to him, and not as the agent of the Company or by their authority; that in truth he acted as a mere

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gratuitous bailee or mandatary on all such occasions ; and even if he stipulated for, or received, any hire or compensation for such services, he did so, not as the agent of or on account of the Company, but on his own private account, as a matter of agency for the particular bailors or mandators. Now, certainly, if these matters are substantially made out by the evidence, they constitute a complete defence against the present suit.

There are some facts in the case, which are beyond the reach of any just controversy. In the first place, there is no pretence to say, that the Company have ever received any freight, hire, or compensation, for the carriage of money or bank bills transported in the steamboat, either from the master, or from the owners thereof, or have ever supposed themselves entitled thereto. No claim of that sort has ever been set up by them against the owners of such bank bills, or against the master, although the carriage of packages of money and bank bills by him has been constantly known and understood by them ; nor has the master ever credited them with any such hire, freight and compensation, although he has constantly credited them with the freight of goods and merchandise carried in the steamboat, whenever he has received it. This is a very significant circumstance to establish on the part both of the master and the Company their mutual understanding of such transactions, — that they were mere private agencies of the master, and not agencies on behalf of the Company, authorized by them, either as common carriers, or as mandataries. There is also a total absence of all evidence to establish, that the Company ever held themselves out to the public by advertisement or otherwise, through their directors, or the other regular officers of the Corporation, as common carriers for such purposes ; or that they ever entered into any contracts of this sort, for hire or compensation, directly with any person or persons for whose benefit the

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money or bank bills were transported. The most, that can be said, is, that the master might well be deemed their agent for such purposes. But that must proceed upon the ground, either that he had full authority, or that he was held out to the public as having full authority, or that his acts admit of no other reasonable interpretation. If his acts may just as fairly be attributed to a private personal agency for third persons, and, *a fortiori*, if taking all the circumstances, they naturally lead to the latter conclusion, then the presumption of the liability of the Company therefor is completely repelled.

In the next place, if the testimony of the persons, who have been successively masters of the steamboat is admissible, and is believed, they state facts and circumstances, which directly confirm the material grounds of the defence. They state in substance, that at the successive periods of their command of the steamboat, they have been accustomed to carry packages of bank bills for the banks at Nantucket, and for various private persons, to New Bedford, for several years, to the amount of hundreds of thousands of dollars; that they have always deemed themselves as acting therein as the private agents of the bailors; that they have never received any such packages for the account of the Company or by their authority; that they have always done this business as gratuitous bailees, never charging any commission or requiring any compensation as a matter of right, except when requested to give a special receipt therefor, (which however was rarely done), and then they charged on their own account a small commission; that they have occasionally received from the banks, as well as from private persons, a small compensation for these services, such as they chose to pay, as a mere gratuity, or voluntary recompense, but without any claim of its being due to them as a matter of right or duty; that such gratuities and recompenses have been rarely paid by private persons, and not even uniformly paid by the banks,

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which were in the constant habit of sending such packages; but it has been sometimes intermitted by them for a considerable length of time; and that such gratuities and recompenses were never accounted for by them to the Company; but were always applied to their own private use and benefit.

Such is the substance of the facts and circumstances, either directly stated by the masters, or fairly deducible from their testimony. It is in no small degree corroborated in its general bearing by the testimony of common packet masters, who have been accustomed to carry like packages of bank bills for the last forty years, and who always treated such bailments as gratuitous, and as special agencies of their own, and never claimed any compensation therefor, on account of the owners of their vessels. It is also in no small measure sustained by the absence of any positive testimony on the part of the libellants of any instances except those stated by Mr. Starbuck, in which a compensation has been claimed of banks, or allowed by them, as a matter of right by the master, or of its having been paid by individuals at any time otherwise than as a gratuity to the master, or as a personal compensation to him for his services. There is this additional consideration of no small weight, that, if these packages were within the scope of the business of the Company, and were carried at their risk, and for compensation and hire, it is surprising, that there should not have been a uniform course of dealing with all persons sending the packages, and a uniform price, or at least a reasonable recompense, always charged on one side, and paid on the other. Yet there is a total absence of all proof to this effect. It is not pretended, that the Company ever received any such price or recompense, or ever claimed an account therefor from the master; or ever made it an item of charge or credit in their dealings with the bailors. How are we to account for such a state of things, if in truth they were incurring on every trip such vast risks and respon-

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sibilities for uncounted sums? One should suppose, that such risks and responsibilities would naturally introduce a regular commission or charge therefor, such as is generally paid in other cases, in nature of a commission *del credere* or guaranty. It would seem strange, that the Company should slumber over their own rights during so long a period, and should indiscriminately receive all such packages from all persons, and yet should not charge any fixed commission, or uniformly claim any from the bailors for such risks and responsibilities. On the other hand, if these were cases of gratuitous bailments, or of personal agencies on the part of the master unconnected with his official duties, or the common business of the Company, the state of the facts is exactly what it ought to be; and there is nothing, which either requires explanation, or solicits inquiry. On the opposite supposition, there would seem to be many circumstances admitting of no reasonable or satisfactory explanation.

But the testimony of the masters has been denied to be competent; and the exception has been especially urged against that of Capt. Phinney. The latter was the master, who took the package of bank bills, for the loss of which the present suit is brought. In order to establish his competency, notwithstanding his relation to the cause, the respondents upon their direct interrogatories annexed to his deposition, asked him, if he had not received a release from them of all liability on account of the subject-matter of the suit? He answered, that he had, and produced the supposed release and annexed it to his answer. Now, it was first objected, that his answer upon the interrogatories of the respondents was no proper proof of the execution of the release, (whatever might have been the case, if the answer had come out upon the cross examination upon the interrogatories of the libellants) but the execution should be proved by the subscribing witness. I thought at the argument, that the objection was untenable, and that

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it was wholly immaterial, by which party the question was asked ; because a witness, producing a release from his own possession, as a part of his testimony, in answer to a question put to him, need not prove the execution of the release by the subscribing witness ; but it is to be taken as a part of his testimony. Indeed, when the question was asked by the respondents in order to establish the competency of the party, as their own witness, they would be estopped afterwards to deny it, and the witness having received the release, it would be and must be treated as between him and them as a true and valid release, without any other proof. The case of such a release, produced by a witness, is entirely different from that of a release, produced by a party to a suit, to establish his own title. In the latter case, the party must prove its due execution by the subscribing witness. Several of the cases cited at the bar turned upon this distinction. *Morris v. Thornton* (8 Term R. 303) ; *Jackson v. Pratt* (10 John. R. 381), were cases, where the party to the suit founded his title upon the deed or diploma. The case of *Hall v. The Connecticut Steamboat Company* (13 Conn. R. 329), stands upon a distinct ground ; for there the witness did not produce the release, nor did it appear ever to have been delivered to him, and his interest was established by independent testimony, and not upon his own examination or cross-examination. Whether some of the *dicta* in the opinion of the Court are maintainable, or not, in point of law, is a matter, therefore, which this Court is not now called upon to consider. In all cases of this sort, where the question of competency of a witness arises upon his deposition, and not otherwise, it is to be disposed of upon the interrogatories in the deposition, in the same manner, as it would be upon an examination upon the *voire dire* ; that is to say, the objection of incompetency may be removed in the same way and by the same evidence of the witness, by which it has been established. The doctrine is fully borne out by the language of

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Mr. Phillippo in the later editions of his work on Evidence, and by the cases there cited;¹ and especially by the case of *Ingram v. Dade*, before Lord Ellenborough, in 1817, (1 Carr. and Payne, R. 235, note), and *Goodhay v. Hendry* (1 Mood. and Malk. 319); and the case of *Wandless v. Cawthorne* (cited 1 Mood. and Malk. 320, 321, note); and *Carlisle v. Eady* (1 Carr. and Payne, R. 234). Indeed, the only point of difference among the learned Judges upon any of these occasions has been, not, whether the release should be proved by other witnesses; but whether it should be produced at the trial by the witness.

Another objection of a more serious cast has been taken to Phinney; and that is, that the release cannot be operative at all to discharge the master from the damages, which may be recovered by the libellants in this case, because it is not a release of a present but of a future interest, not yet vested in the releasors; and for this position the *dictum* of the Court in *Francis v. The Boston and Roxbury Mill Corporation* (4 Pick. R. 367, 368), is relied on, that a release cannot operate to extinguish or defeat future rights or claims; a *dictum*, which may be perfectly correct, when applied (as it there was) to a release of future damages for future acts; but which cannot be applied to a release of future damages for past acts, without shaking the well established doctrine. If the argument be well founded, then every person, who is sued as principal, for any act of negligence of his agent, or servant, such as a coachman, or a factor, or a master of a ship, could not by a release restore the competency of such person; and yet, as we all know, this is every-day practice. In the case of *Green v. The New River Company* (4 Term R. 589), which was an action against the principals for the negligence of their agent, the Court held the agent incompetent without a release; and by

¹ Phillippo & Amos on Evid. 8th London edit. 1838, p. 149 to 151. S. P. 1 Phillippo on Evid. by Cowen, 7th Amer. edit. 1839, p. 134.

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necessary implication, therefore, held him competent with a release. The same doctrine is abundantly shown to be well established by Mr. Phillipps in his Treatise on Evidence, and in the cases there cited.¹ Indeed, it may be taken as a general principle, in cases of this sort, that a release of all actions and causes of actions, or of a particular cause of action, which has happened before the time of the release, will discharge the witness from all liability, depending upon the event of the suit, in which he is called as a witness, touching his conduct in the matter, on which the suit is founded; for the cause of the liability then existing, the release will operate to discharge that, and incidentally the future damages recovered on account thereof. The cases of *Scott v. Lifford* (1 Camp. R. 246), and *Miller v. Falconer* (1 Camp. R. 281), and *Cartwright v. Williams* (2 Starkie R. 342), are directly in point. Another objection was taken to the language of the release; and certainly there was an accidental mistake in it, which might perhaps have brought its true construction into doubt, as a release of the present cause of action. But I should have had no difficulty, if this objection had not been waived, in deciding, that time ought to be allowed to correct the mistake, as it was obviously a matter of entire surprise upon all the parties thereto.

But it does not appear to me, that, upon a just survey of the whole evidence, any thing very material hinges upon the admissibility of any of the witnesses, whose testimony has been objected to; for the main facts are abundantly supported by evidence *aliunde*; and presumptive inferences against its force are equally repelled by the offer, as it would be by the production, of their testimony. Now, it is not a little re-

¹ Phillipps on Evid. by Amos, 8th London edit. 1838, p. 84 to 104. Id. 152. S. P. 1. Phillipps on Evid. by Cowen, 7th Amer. Edit. 1839, p. 56. Id. 134. Com. Dig. Release E. See also *Trueman v. Loder*, (11 Adolph. & Ellis, 589, 596.)

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markable, (as has been already suggested), that most of the witnesses, who have been examined on each side, agree, that they never supposed the owners responsible, but they have treated the case as one of a private personal agency of the master, either gratuitous, or as his personal and private perquisite. Most of them have deemed the service gratuitous; and not one of them pretends, that the Company ever, to their knowledge, held themselves out as common carriers, for hire, of bank bills; or that they avowed any responsibility for the carriage thereof, or ever demanded any compensation therefor.

The main stress of the argument for the libellants is, indeed, founded upon the general proposition, that steamboat owners generally are common carriers not only of passengers, but of goods and merchandise of all sorts, including money and bank bills, for hire. Now, if this were clearly made out, there would, in my judgment, be great difficulty in maintaining, that any evidence would be admissible to prove any usage or custom in this particular business, to exempt them from the ordinary liabilities of common carriers, and to throw the responsibility exclusively upon the masters of the boat. I have in former cases had occasion to express my entire dissatisfaction, with the practice of introducing supposed usages and customs, to control the construction of contracts and the ordinary principles of law; ¹ and I greatly rejoice to find, that my own doubts and difficulties have been fully borne out and confirmed by very recent decisions in England, and especially by the case of *Trucman v. Loder* (11 Adolph. and Ellis, 589, 597, to 601), where the subject was very elaborately considered by Lord Denman, in delivering the opinion of the Court. I am not unaware of the bearing of the cases of *Halsey v. Brown* (3 Day, R. 346); and *Renner v. The Bank of Columbia* (9 Wheat. R. 582, 590, 591), in the opposite direc-

¹ *Donnell v. Columbian Insur. Comp.* (2 Sumner R. 366.) *The Schooner Recede*, (2 Sumner, R. 567.)

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tion ; but they are clearly distinguishable. They do not go to the extent of establishing, that a local custom or usage will dispense with the principles of law ; but merely to establish, in the one case, what the local custom, as to days of grace, was, and in the other case, what were properly to be deemed contracts on account of the owners of the ship, and what merely personal contracts of the master. That is the very question involved in the present case.

It is, therefore, assuming the very point in controversy, to assert, that the Company in the present case were common carriers for all purposes for the carriage of bank bills, as well as for the carriage of passengers and goods and merchandise for hire ; and that the master acted as their agent, and on their account, in the receipt of bank bills, as well as in the transportation of passengers and goods and merchandise. That is a matter to be made out by proofs, establishing that it was within the ordinary scope of their business, and adopted and sanctioned by them ; or, at all events, that they held themselves out to the public as general carriers to such an extent. It is said, that the owners of a ship are bound by the contracts made by the master thereof, notwithstanding he may have violated his private orders ; and this is true, where the act done is within the scope of the ordinary employment of the ship ; for to that extent he is held out by the owners as having a general authority. But this doctrine leaves the question quite open and untouched, what is the ordinary employment of the ship ; for the master cannot bind them beyond it. Lord Tenterden in his *Treatise on Shipping*¹ lays down the rule of law on this subject in its true terms, that the owners are bound to the performance of every lawful contract of the master relative to the usual employment of the ship ; and he adds in illustration of the rule, that if a ship were built

¹ See *Johnstone v. Osborne*, (11 Adolph. & Ellis, 549, 557.)

² *Abbott on Shipping*, pt. 2, ch. 2, § 2, § 3, § 6.

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for the purpose of conveying passengers only, or merchandise only, and employed in that particular trade, the owners are not answerable for a contract made by the master to employ the ship for a different purpose or in a different trade; for it does not relate to the usual employment of the ship.¹ The case of *Boucher v. Lawson* (Cas. Temp. Hard. 85; Ib. 194), turned mainly at the argument upon this consideration. The property (gold) there taken on board in Portugal was on freight, and shipped under a bill of lading; and the special verdict found that fact, as also that it was usual, when any gold is exported from Portugal to England, for the master of the vessel to take the whole freight to his own use, without accounting for any part of it to his owners, unless there be some special agreement between them to the contrary, which there was not in that case. The cause was several times argued, and finally went off upon another point. Lord Hardwicke however seems to have thought, that the special verdict was not as full, as it should be. He said, that the property being shipped on *freight*, and *freight*, being the fruit and earnings of the ship, by the rule of law, belonged to the owners, and the master was only entitled to wages; and, therefore, upon the terms of the bill of lading, the freight would belong to the owners under such circumstances. The usage might not make any difference; for then it might amount only to this, that the owners intended to make an allowance to the master of this part of the freight, in consideration of paying him less wages, or on some other consideration; so that it would be but an allowance of part of their own profits to the master; and they would, notwithstanding, be liable. And, therefore, if the finding on the usage was to be taken consistently with the bill of lading, and the reward for carrying the gold was *freight*, and consequently by the rule of law belonging to the owners, they would be liable for the loss. The whole of his

¹ Abbott on Shipp. pt. 2, ch. 2, § 3. Id. § 6.

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Lordship's reasoning turned upon the peculiar wording of the special verdict, as to the shipment being on *freight* and technically so called; and upon this, that the taking of goods on freight was within the scope of the ordinary employment of the ship. But it seemed to be understood on all sides, that if such was not the ordinary employment of the ship; or if the shipment was a mere personal contract of the master on his own account, and he alone was entitled to the hire, and the owners had no title to the hire as owners, that then and under such circumstances they were not liable for the loss.¹ The case of *Dwight v. Brewster* (1 Pick. R. 50, 54), does no more than affirm, that the owners are liable, where they are common carriers, and the profit made by the carriage of bank bills is within the scope of their business and for their account; and that of *King v. Lenox* (19 John R. 235), shows, that the owners are not bound for shipments not made in the course of the employment of the ship on their account, but on account of the privilege of the master. The case of *Middleton v. Fowler*, (1 Salk. 282), is, however, still more directly in point to the circumstances of the present case. There, the action was against the proprietors of a stage-coach for the loss of a trunk of the plaintiff; and Lord Chief Justice Holt was of opinion, that the action did not lie, saying that a stage-coachman was not liable, within the custom, as a common carrier, unless such as take a distinct price for carriage of goods as well as persons; as wagons with coaches; and though money be given to the driver, yet that is a gratuity, and cannot bring the master within the custom, for no master is chargeable with the acts of his servant, but when he acts within the execution of the authority given by his master.² The case of *Allen v. Lowell* (2 Wend. R. 327), is not an authority the other way, for it was reversed upon error by the Court of Errors of New

¹ See Abbott on Shipp. pt. 2, ch. 2, § 6 to § 9.

² See also Story on Bailm. § 500, § 507, and cases there cited.

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York, *Lowell v. Allen* (6 Wend. R. 335). If I were compelled to choose between the relative authority of these decisions, upon the ground of the reasoning contained therein, I should certainly have deemed that of the Court of Errors the best founded in the principles of law. The reasoning of the Court below in that case seems to me to have been founded mainly upon an assumption of the very point in dispute; that is, whether the owners of the steamboat were common carriers of money for hire; for no one can well doubt, that they were not liable therefor, if the ordinary employment of the steamboat, on account of the owners, was confined to passengers and common merchandise for hire, and that the carriage of money was a personal perquisite of the master upon his own sole account, and he received the same and pay therefor, not by their authority, or as a part of their business, or by their command, but simply at his own personal risk as special bailee. The knowledge of the owners, that he carried the money for hire, would not affect them, unless the hire was for their account, or the master held himself out as their agent in that business, as being within the scope of the usual employment and service of the steamboat. That is the true doctrine, and is fairly deducible from the case of *Edwards v. Sherrett* (1 East R. 600), although the circumstances of that case called for a somewhat modified statement of it. The case of *Sheldon v. Robinson* (7 New Hamp. R. 157), directly decided, that the driver of a stage-coach, (the proprietors of which were common carriers of passengers, for hire), did not, by carrying packages of money and bank bills for hire, which he received for his own sole account, become himself responsible as a common carrier; but was merely a common bailee for hire, and subject only to the responsibilities thereof; which necessarily supposes, that he did not in such cases act as agent of the proprietors in their common stage-coach business; and that they were not responsible for his acts.

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In short, in all cases of this sort, the true solution of every question of the liability of the owners of a steamboat must depend upon this, whether the master is acting within the scope of the ordinary employment of the owners of the boat, or not. If the master alone receives the hire for himself, and on his own sole account, and does it as a matter of favor and not of duty, and it constitutes no part of the business or employment in which the owners are engaged, and is not performed by their orders or authority, and they are entitled to no share of the profits, then the owners are not responsible, unless indeed the owners hold the master out to the public as acting in these respects for them, and as capable of binding them by his acts. And my judgment, therefore, is that the *onus probandi* is upon the libellants to establish, that the owners are common carriers to the full extent of incurring liability for the carriage of these bills before they are entitled to recover. If they leave the matter in doubt, that is decisive for the respondents.

It is precisely in this view, that the evidence, as to the supposed usage or practice introduced into this case, is admissible, not to show, if the owners were common carriers of bank bills for hire, some usage or practice to treat them as not liable for losses of bank bills intrusted to them, for I am not prepared to say, that any such evidence would be admissible to control the well-established rules of law; but as evidence to show, what was the ordinary employment or business of the Company, and whether they ever held themselves out to the public as common carriers of bank bills for hire, or that the master was authorized as master to contract for the carriage thereof on their account. In this view it appears to me, that the evidence is exceedingly strong and cogent to establish, that the public, at large, did not understand, that the Company ever held themselves out as common carriers of bank bills for hire, or even as gratuitous bailees, or that the masters of the steam-

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boat ever held themselves out as capable or authorized to bind the Company by any such contract, or that it was within the scope of the ordinary employment or business of the Company. Most of the witnesses, as has been already suggested, treat it clearly as a case of personal agency of the master on his own personal account, either as a common bailee for hire, or as a gratuitous bailee. The weight of the evidence, indeed, seems to lead to the conclusion, that the master acted often, if not generally, as a gratuitous bailee, and that the reward sometimes paid him was either a mere gratuity, or at most a mere personal charge on his own account. If it was a mere gratuity, it would be difficult to show, how the Company could be liable therefor, since it would be almost incredible, that they should be willing to incur said extraordinary risks without any compensation ; and, indeed, since it might well be questioned, whether any such business was within the scope and objects of their charter. At all events, no presumption of this sort should be indulged, unless upon the most direct and positive proofs, that the Company had expressly sanctioned and authorized it.

And this leads me to say a few words upon the language of the charter of incorporation of the Company, by the act of 1833, ch. 11, (7 Mass. Special Laws, p. 283). That act incorporates the Company, expressly for the purpose of running "a steamboat and two other vessels, not exceeding seventy-five tons each, for the convenience of the public travel, and the transportation of *merchandise* between Nantucket and New Bedford, and the intervening places." Now, certainly, it may be fairly presumed, that the public either knew, or were bound to know, what the powers and rights conferred by the charter upon the Company were ; and the Company are to be presumed not to intend to transcend the powers and rights so conferred, or to usurp other functions. Unless then the word "*merchandise*" in that act, fairly interpreted

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in its common sense, includes the transportation of *bank bills*, it is certain, that the Company had no authority to engage in such business for hire, as common carriers; and the public had no right to contract with the Company for the transportation thereof. The argument, therefore, has been addressed to the Court, that bank bills are "merchandise" within the scope and objects and sense of the charter. I confess, that I am unable to accede to the argument. I agree, that the word "goods" may in some connections (certainly not in all) include bank bills; for the term goods (*bona*) in the common law has a very extensive signification.¹ So, the word "chattels" may; and *a fortiori* the word "property," which is of larger signification. Some of the cases cited at bar go to this effect. In *Tisdale v. Harris* (20 Pick. R. 9), it was held, that under the word "goods" in the Statute of Frauds, the sale of the stock or shares of an incorporated company are included. But the same question has never yet been decided in England; and upon argument at one time, before all the Judges of England, they were divided in opinion upon the point.¹ In *Whiton v. The Old Colony Insurance Company* (2 Metcalf's R. 1), the same learned Court held that "bank bills" were well insured under the word "property" in a policy on time in the coasting trade. In this case the Court placed some reliance upon the nature of the business, the insured being the master, as well as the owner, and therefore contemplating various changes of the property from sales and purchases. But at the same time the Court admitted, that ordinarily bank bills are treated as money or cash. In *Turner v. Fendall* (1 Cranch R. 117, 133) the Supreme Court of the United States held, that money (that is, coin or specie)

¹ See *Pickering v. Appleby* (Comyn's R. 354); 2 Peere Will 308; *Mussell v. Cooke* (Preced. in Cha. 533); Long on Sales, (Rand's edit. 1839,) p. 90, 91; 2 Starkie on Evid. (4th Amer. edit. 608); Id. 2d English edit. (1833) p. 352; *Calye's Case*, 8 Co. R. 32, 33.

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might be taken in execution; and in *Handy v. Dobbin* (12 Johns. R. 221), the Supreme Court of New York held, that "bank bills" were money, and might be taken in execution. On the other hand, it was held by Mr. Justice Dampier in *Thomas v. The Royal Exch. Insur. Company* (Manning's Dig. Insur. B. a. pl. 5, 6; 1 Phillips Insur. ch. 5, § 2, p. 172, 2d edit.), that although a policy on goods and merchandise will cover specie dollars, yet it will not cover "bank bills." In *Rex v. Burrell* (1 Carr. and Payne, 310, 454), it was held, that an indictment for embezzlement of money, alleged to be the money of certain directors, who were by statute vested with "all goods, chattels, furniture in the house of industry, clothing, and debts," due to the corporation, established by the act, was not sustained by proof, that the money belonged to the corporation; for that the word "goods, chattels," &c. did not include money. Under a bequest in a will of "goods," bank bills and money will pass; and under a bequest of "money" bank bills will pass. But no case can be found, at least as far as my researches extend, in which it has been held, that a bequest of merchandise would include "bank bills." The term "merchandise" is usually, if not universally, limited to things, that are ordinarily bought and sold, or are ordinarily the subjects of commerce and traffic; and is never applied to *choses in action*, as bank bills really are. In truth bank bills are ordinarily treated as money or currency, and the phrase "merchandise" is used in contradistinction thereto. The fact, that a thing is sometimes bought and sold is no proof, that it is merchandise. A bond, an annuity, a legacy, a debt due on account, may be bought and sold; but no one would assert any of these things to be merchandise. They would never pass by a grant of merchandise. A sale of all the goods and merchandise in a certain shop would never be presumed as intended to include the personal wearing apparel of the owner, although at the time it might be deposited

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there. It is said, that bank bills are often bought and sold; that is true; but it does not hence follow, that they cease to be currency and become merchandize. Their primary function, that of currency, gives them their common denomination, and they are therefore, in the ordinary transactions of life, treated as money. They may, if not objected to, be a good tender in payment of a debt. But no person ever supposed, that merchandize, in the ordinary acceptation of the word, could be a good tender. In short, the term "merchandize" is usually applied to specific articles, having a sensible, intrinsic value, bulk, weight or measure, in themselves; and not merely evidences of value, such as notes, bills of exchange, checks, policies of insurance, and bills of lading. In the case of *Sewall v. Allen* (6 Wend. R. 335), the Court of Errors held that a steamboat charter, authorizing the Company to transport "goods, wares and merchandizes," did not necessarily or naturally include the carriage of bank bills, so that, unless the Company actually made that a part of their ordinary business of common carriers, they were not liable for any loss thereof. Upon that occasion two of the learned Judges, constituting a part of the majority, were of opinion, that "bank bills" did not fall within the denomination of goods, wares or merchandizes; and another Judge held, that although they might fall within the denomination of goods, under certain circumstances, yet that they ought not to be held so in that case, unless that was a part of the ordinary business of the Company. My own judgment strongly inclines me to the same conclusion; and the reasoning of the Judges of that high Court, in support of it, appears to me very cogent and striking. But in the charter now under consideration, the word "goods" is not found. If it were, there might be a more distressing difficulty to be encountered in construing it.¹ As it is, I have not

¹ 2 Williams on Exors. Pt. 3, B. 3, ch. 2, s. 4, p. 854, 855, 861, 862, 2d edit. London, 1838.

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been able to persuade myself, that either the corporation or the legislature, under the word "merchandize," meant to include "bank bills," as an object of regular transportation for hire. At all events, if they did, it seems to me, that the word merchandize, ordinarily, has a much more restricted meaning, and in this respect I adopt the doctrine of the Court of Errors of New York. It is incumbent upon those, who assert, that the charter includes such an expanded meaning, to show by some clear and determinate proofs, that the Company have positively adopted and acted upon that meaning. If they had advertised, that they would transport merchandize or freight in their steamboat, it would hardly be pretended, that the public were misled, by supposing, that it included transporting bank bills for hire, unless some unequivocal act of the Company established that interpretation beyond controversy. There is no evidence in the present case, that the Company ever did intend to receive any bank bills for transportation for hire, or held out such an intention to the public, or ever gave any authority to the master, to receive it on their account. All his acts admit of a very different interpretation, whether the compensation received by him was a gratuity or a price for the service, and are of just such a character as must occur, if he was acting on his own personal account, and at his own personal risk, and for his own personal advantage, or his desire to oblige others. It is no sufficient answer, that the Company did not give notice, that they would not be responsible for the acts or negligences of the master, in the carriage of bank bills. Such a notice could be required only in cases, where they had reason to believe, that the master held himself out to the public as entitled to contract on account of the Company, or it was an act done within the ordinary scope of their business or employment.

In the view, which I have taken of the law applicable to the present case, and the evidence produced by the parties, it has been unnecessary for me nicely to compare and sift

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the relative credibility of those of the witnesses, whose testimony is in contradiction to each other, because the facts, which stand uncontradicted, or are supported by an unequivocal weight of evidence, in my judgment satisfactorily dispose of the whole merits. The result, to which I have arrived upon a review of the evidence, is, that the Company never intended to be common carriers of bank bills for hire; that they never held themselves out to the public in that character; that they never authorized the master to contract on their account for the carriage thereof; that he never intended to do so, or held out to the public that he had any authority; that all the contracts, made by him for the carriage of bank bills, were designed by him to be his own personal contracts, and upon his own personal responsibility; that for the most part the services performed by him in the carriage of bank bills were gratuitous; and even when he received any compensation, it was commonly received by him as a gratuity, and not as a matter of right, although there were some instances to the contrary. That the public generally, although not universally, seem to have understood these to be the mere personal contracts of the master, and not at the risk, or for the account of the Company; or at least, that this was a common impression among many of those, who entrusted him with the carriage of bank bills; that the charter of the Company does not seem to have contemplated the transportation of bank bills as an ordinary business or employment of the Company, even if capable of being construed to include the right so to do, under the term "merchandize;" and therefore, clear and unequivocal proofs ought to exist, to establish the broader construction on the part of the Company, before they should be affected with liability therefor; and finally, that in this case there are no such proofs. Under such circumstances, it seems to me, that the decree of the Court below, dismissing the libel, ought to be affirmed.

In delivering this opinion, I have studiously abstained from

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deciding, whether the master in this case was guilty either of gross or of ordinary negligence, in the loss of this package of bank bills, because that question may yet arise, and be brought directly in judgment in a suit against the master. I feel, however, bound to say, that if I had been entirely satisfied, that the master was not guilty either of gross or of ordinary negligence, I should have been spared the many other laborious inquiries, to which this opinion has been addressed. It is the doubt on this head, brought to my mind, which has compelled me to go at large into all the other grounds, upon which I hold the Company absolved, even if the master was guilty either of gross or of ordinary negligence.

In the course of the argument it was intimated, that in libels of this sort, the proceedings might be properly instituted both *in rem* against the steamboat, and *in personam* against the owners and master thereof. I ventured at that time to say, that I knew of no principle or authority, in the general jurisprudence of Courts of Admiralty, which would justify such a joinder of proceedings, so very different in their nature and character, and decretal effect. On the contrary, in this Court, every practice of this sort has been constantly discountenanced, as irregular and improper. The case of *The Friend* (3 Hagg. Adm. R. 114) was cited at the bar, in support of the right to join the proceedings. That case is very imperfectly reported. But it appears that the original proceeding was *in rem* against the ship, for a collision, and that Wardell, who was the master, and also the principal owner, and to whose negligence the libel attributed the collision, alone appeared in the suit. By the statute of 53 Geo. 3. ch. 159, the owners, when the loss has been without their fault or privity, are not liable beyond the value of their ship and freight; but the owners, who are in fault, and the master also, are liable to full damages to the extent of the injury done to the other party. No bail was given. The freight was brought

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into Court, the ship was sold, and the proceeds falling short of the damages by 400*l.*, a monition issued against Wardell to pay that sum, which failing to do, he was imprisoned upon an attachment, moved for and granted by the Court. Now, it is apparent, that there was a great peculiarity in this case, Wardell being the sole party, who intervened, and being by the statute liable for the full damages. A monition issued before the attachment was granted ; and if that monition was preceded by a supplementary libel, or act on petition, stating the facts of the sale of the ship, and the deficiency to pay the damages, the proceeding was clearly regular and right. But if no preliminary proceeding was had, I confess, that I do not well see, how a proceeding, originally *in rem*, could be prosecuted *in personam* against a party, who in such proceeding intervened only for and to the extent of his interest. Probably there were other circumstances, which varied the general rule. At all events, I am not prepared to accede to the authority of this case, if it is to stand nakedly, and only upon the circumstances above stated. In cases of collision, the injured party may proceed *in rem*, or *in personam*, or successively in each way, until he has full satisfaction. But I do not understand, how the proceedings can be blended in the libel. The case of *The Richmond* (3 Hagg. Adm. 431) is a case more conformable to my notion of the practice. But there the ship was not arrested ; and the proceedings were *in personam* against the owners.

On the whole I am of opinion, that the decree of the District Court ought to be affirmed ; but as the appeal seems to me, under all the circumstances, in a case of such novelty and intricacy, to have been fully justifiable, I should have inclined to award, that one half of the respondents' costs in this Court should be borne by them, and the other half should be borne by the libellants, if it could have been done without breaking in upon the settled practice of the Court. As it is, the respondents must take their full costs.

OCEAN INSURANCE COMPANY

v.

ROBERT FIELDS, IN EQUITY.

A BILL in Equity, although it charge a felony, may be sustained by proof; but the Defendant is not bound to make a discovery thereof.

At Common Law, the civil rights of a party, injured by a felonious act, are only suspended until the rights of the Government to punish it criminally have been satisfied. But a verdict and judgment thereupon are conclusive, as to the fact, in a suit upon any collateral matter connected therewith.

If the felony be not cognizable under the criminal law of the country, where civil redress is sought, the civil rights of the party seeking redress are not thereby suspended.

A Bill in Equity will be sustained to set aside a judgment upon a policy of insurance, upon the ground of such newly-discovered evidence of fraud and felony on the part of the original plaintiff, as would, if pleaded, have been a perfect defence to the previous action; especially, if the felony were committed by a British subject in a British vessel, on British waters; for the offence is not, in such case, punishable by the criminal law of this country.

Over-valuation and misrepresentation of the value of the subject-matter of insurance, although they afford no conclusive proof of fraud, afford a very strong presumption thereof.

The office of a demurrer to a Bill in Equity, is to bring before the Court the right to maintain a bill, admitting all its allegations to be true, and the Court will not, therefore, examine *aliunde*, what facts might or might not defeat it; for this is the office of an answer, or plea.

Although a Court of Equity will not ordinarily grant relief, in cases after trial, where mere cumulative evidence of fraud or of any other fact is discovered, yet it will, wherever the defence was originally imperfectly made out from the want of distinct proof, which is afterward discovered; although there were circumstances of suspicion.

BILL in Equity to set aside a judgment in this Court obtained upon a policy of insurance upon the ground of newly-discovered evidence. The bill in substance stated, that the defendant was, or pretended to be, the owner of a schooner called the *Frances*, which he had agreed to sell at Antigua for

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\$6000, and had agreed to carry there from St. Johns with a cargo of lumber: and that the said defendant intending to defraud the plaintiffs, and to induce them to insure her for more than she was worth, and then to cast away and destroy her, and then to demand the sum insured, did, on the 1st of May, 1837, fraudulently represent to the plaintiffs, that the said vessel was worth \$8000, and procured insurance for one year on the said vessel valued at that sum: and that the plaintiffs being deceived by the said pretences, executed two policies to that effect, which is set forth. That the said policies being obtained by fraud, were void. That the said defendant on the 29th of June, 1837, intending to destroy the said schooner, and fraudulently to recover the said insurance, sailed from St. Johns with a cargo of lumber, and a crew selected by him, ostensibly for Antigua, and proceeded down the Bay of Fundy in pleasant weather, from side to side, with the apparent intent to effect his said intention, and navigated her among breakers, where she was saved by the interference of the crew; that he went out of his course without necessity; and that, on the 2d of July, 1837, he intentionally cast her ashore in a dangerous situation, fastened her there, and went on shore with his crew, and suffered her to remain there eleven days, though she might easily have been got off; and that while so lying, a rock under her bilge caused her to leak.

That, about July 16th, 1837, one Hutchins took possession of her and got her off, and removed her, full of water, to Mud Island. That, about July 17th, 1837, Elisha D'Wolf took her from the said Hutchins, and carried her to Pimlico, a convenient place for repairs. That, about July 31st, 1837, John Everett, agent for the plaintiffs, took charge of her, and with the assistance of the defendant and one Rankin, unloaded the residue of cargo, repaired her bottom, and made her tight enough to be carried to St. Johns. That, about the 9th of August, 1837, the said vessel proceeded towards St. Johns,

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the said Rankin being on board as seaman, and Fields (the defendant) as passenger, under command of Everett. That, on her passage she went into Yarmouth harbor, and waited there two days for a favorable wind, and leaked but little. That the defendant bought an auger at Yarmouth, and bored, or caused to be bored, holes through the inner plank of the said vessel, and through the out-board plank five holes, which he then filled up with slight plugs, easily removed. That, the said vessel proceeded on her passage and came to anchor in Cranberry Cove, the weather being pleasant, and the water smooth; that the said Everett, having caused the vessel to be pumped dry, went below for two hours, and then returning to deck, found her half full of water and sinking; which was owing to the withdrawal of the said plugs; and that the said vessel was then drawn on shore and filled with water.

That, on August 14th, the defendant insisted upon having a survey, which was held, and the said vessel was condemned and sold for \$782.20, which was paid to the said defendant. That, on February 23d, 1838, the said defendant Fields sued out a writ from the U. S. Circuit Court for the first Circuit against the plaintiffs, returnable, &c.; and that, at the Oct. Term, 1838, issue was joined, and that a trial was had before a jury, and that your orators being ignorant of such fraudulent intent and practices, and unable to prove them, a verdict was rendered in favor of Fields, which the plaintiffs were compelled to pay. That since payment, the plaintiffs discovered and were informed of the said boring, and hoped, that they would not have been called on to pay the sums so insured, and that the sums paid would be refunded. That the defendant pretends, that the policies were not fraudulently obtained; that the plaintiffs were not deceived; that no attempt was made to destroy the said vessel or to defraud the plaintiffs; and that the plaintiffs were justly held to pay the sums insured. The bill charges that the contrary is true, and

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that the orators were deceived by the said Fields; who intended to defraud and actually did defraud them. Whereupon the bill prayed, that the defendant might answer and especially might state, whether he represented himself to be sole owner at the time of effecting the insurance? whether he was owner, and if not, how much he did own, and who were the other owners? whether he had not agreed to sell her for \$6000, and to whom? whether he did not take passage in her for St. Johns? whether he and Rankin were not on board while she was unloading? whether while at Yarmouth the said Rankin at the defendant's request did not purchase an auger? and for what purpose, and what use was made of it? whether at Cranberry Cove the defendant took charge of the said vessel? whether a survey was there called? whether the vessel was sold, and the proceeds received by the defendant?

The bill also prayed, that the Court would decree the defendant to repay the amount of the said judgment; and that the said judgment should be declared void; and also prayed for farther relief.

A demurrer was put in to the bill, which was argued by *F. C. Loring* for the defendant, and by *Peabody* for the plaintiffs.

Loring argued as follows:—The first objection is, that this bill charges the defendant with a crime, punishable by our laws, and by the English laws, with death; and that the whole equity of the bill is founded on this charge

We maintain that, upon the face of the bill, there is no remedy either at law, or in equity. If the defendant has committed this crime, he may be indicted and punished; but the crime cannot be made the ground and substance of a civil action till after the criminal trial. An action of *assumpsit* will not lie against a man who has stolen money; the civil right is merged or suspended in the felony, and no stronger authority is necessary to sustain this position, than the fact, that no single case can be found, where a bill for

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relief and discovery has been brought on the ground, that the defendant has committed a felony, and thereby become possessed of money to which he was not entitled. *Cox v. Paxton* (17 Vesey 329); *Crosby v. Long* (12 East. 415).

The next objection to the bill is, that it is brought to set aside a judgment, and shows no sufficient cause. The law on this subject is, I suppose, the same as is applicable to bills of review in equity; and the plaintiffs must make out the same cause to set aside a judgment at law as to review a decree of a Court of Equity. (Story's Pleadings, 322, 328, 602; Story's Equity Jurisprudence, vol. ii. 180).

These authorities sustain these positions: that the plaintiffs must show either new matter arisen since the judgment, or new proof come to light since that time, which could not possibly have been used at the trial; and that the complainants could not, with due diligence, have ascertained and proved the new fact at the hearing. The bill affords no ground for equitable relief, and is bad on demurrer.

The bill contains two charges: 1st, a fraudulent over-valuation. But it does not allege, that this was a fact unknown to them at the hearing, nor that it could not have been proved then; nor does it even allege, that the fact set forth as evidence of the over-valuation, the contract of sale, was unknown to them at the trial. But if these things were properly alleged, they do not make out any ground for equitable relief on this point.

Supposing the defendant had contracted to sell his vessel at some future time for \$6000, there would be no fraud in insuring her while she was his property for \$8000, if the insurers were willing to do so. The valuation is not a warranty; the insurer gets his premium; and if there is a substantial interest at risk, which is not denied by the bill, and the owner chooses to pay a high premium, there is no fraud in valuing the subject insured at a higher sum than it would

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bring in the market, if the valuation is not so excessive as necessarily to lead to a presumption of fraud. *Alsop v. Commercial Ins. Co.* (1 Sumner 451); *Marine Ins. Co. v. Hodgson* (7 Cranch).

The second charge is, that the vessel was intentionally cast ashore, and her destruction afterward consummated by boring. There is a general allegation, that the complainants were ignorant, at the hearing, of the defendant's fraudulent acts and intentions, and unable to prove the same; and a special allegation, that since the trial, they have discovered the fact that she was bored, and this special allegation impliedly admits, that they knew at the trial, that the vessel was fraudulently destroyed, and have since discovered the manner in which it was done.

The charge of fraud was in their knowledge at the trial, and the defence was made on that ground; if that does not appear by the bill, it is admitted to be the fact; and it is not in fact pretended, that any thing has since been discovered, except that two or three years after the trial, a piece of wood was brought to Boston, which, it is alleged, was taken from this vessel. This fact, if it be a fact, is not any new matter; but is parcel of the fraud formerly charged by the complainants. If the vessel was bored by the defendant, it was done before the trial.

The complainants then are bound to show, in this bill, that this new proof has come to light since the trial; and not only that, but that they could not by the use of reasonable diligence have ascertained and proved it at the trial. Verdicts will not be set aside, if the facts on which the bill is founded, though discovered since the hearing, might have been before. *Taylor v. Shepard* (1 Y. & C. 271). Nor unless some special ground of equitable relief is shown. *Harrison v. Nettleship* (2 M. & R. 423). Nor to enable a party to get fresh witnesses. *Hankay v. Vernon* (2 Cox, 12); *Williams v. Lee* (3 Atkins, 223); *Whitmore v. Thornton* (3 Price 231).

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Injunction granted after verdict dissolved though bill charged fraud and defendant had not answered. *Le Guen v. Gouverneur* (1 J. C. R. 495); *Bateman v. Millar* (1 Sch. & Lefroy, 201).

What are the allegations in the bill touching this matter? There is not a single circumstance alleged, or reason given, why this proof was not obtained and used at the trial. Even if we admit the general allegation of ignorance not to be contradicted by the special allegation of the discovery since the trial of the boring, the complainants show no cause, and no reason why they did not discover the fraud then. But if we take the case as the plaintiffs state it, that since the trial only, they have discovered that the vessel was bored; then it appears, that they knew or suspected the fraud at the trial; and that, since the trial, they have discovered a single fact going to prove it; and for all that is shown by the bill, this fact might have been ascertained and proved at the trial. Their ignorance of the fact is no ground for equitable relief. The language of the Court in *Le Guen v. Gouverneur* (1 Johnson's Cases, 495) is applicable. "The charge of fraud was in their knowledge, and if it did exist, the presumption is, that they had the proof in their power; for the presumption is, that a party is not ignorant of, or incapable of evincing, the truth of his cause. If the fact be so, it is incumbent on him to show it, in order to excuse the apparent neglect, and support his claim to an exception in his favor. In the present case, there is no circumstance alleged, from which it can be reasonably inferred, that the respondents could not with proper diligence have possessed themselves of evidence of the fact, if such was the fact, in the trial at law, and no such pretence is alleged in their bill."

The bill then is bad, because it does not allege affirmatively, that this evidence could not have been obtained in time for the trial; and because it does not allege that any dili-

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gence was used to obtain it; and that the complainants have not been guilty of *laches*, or negligence, in respect to it; nor does it even allege, how this fact came to their knowledge. *Dexter v. Arnold* (5 Mason 313); *Respass v. McLanahan* (Hardin, 342); *Young v. Keighly* (16 Vesey, 354); *Livingston v. Hubbs* (1 J. C. R. 124); *Bingham v. Danson* (Jac. 243).

If we examine the statements in the bill, in relation to the loss of this vessel, it will appear, that this fact, if it be one, might easily have been ascertained, and proved at the trial, and that they had the power then to prove.

The fact alleged is, that the vessel was bored in her bottom. The existence of such a fact might easily have been ascertained by inspection. The suit at law was commenced in February and tried in October, a period of eight months intervening; this afforded time. The vessel, it is alleged, was sold, and so without the control of the defendant; and it is not alleged, that they were prevented from examining her. The complainants had an agent, Everett, it is alleged, on the spot, who was on board at the time the vessel is said to have been bored. While he was on board, she began, it is said, to leak in a most extraordinary and mysterious manner, which can only be accounted for by her being bored. Each one of these facts is alleged, and moreover the complainants knew or suspected, that this vessel was fraudulently destroyed.

They were then put on the inquiry for fraud. They had time, opportunity, an agent on the spot, and they knew, that the vessel leaked in a manner, which they say can only be accounted for by her having been bored; and yet they never had that vessel's bottom examined, and never took any pains to ascertain whether any injury had been done to her. If the rule were contrary, and plaintiff was held to show, to get this relief, that he had all the means in his power to obtain this evidence, and neglected to use them, the bill would make out a good case.

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Another ground of demurrer is, that the bill seeks a discovery, which may subject the defendant to a criminal prosecution. As to the discovery sought, this is undoubtedly good cause of demurrer: and if the bill is so framed, that the defendant is not bound to answer it, or any part of it, then it is bad on general demurrer. (Story, Eq. Pl. 438, 452.)

The offence charged is punishable by our laws with death. It appears from the allegations of the bill, if they are true, that the defendant, being the owner of this vessel, did, on the high seas, wilfully and corruptly destroy this vessel with intent to prejudice the insurers, by intentionally casting her ashore, and then consummated his purpose by boring; thus bringing the defendant within the scope of the Statute 26 March, 1804, §1.

The idea of seeking a discovery by a bill in equity, which may subject the defendant to the loss of his life, is abhorrent to all the principles of law and equity, which are recognized in the courts of England and this country.

Peabody, for the Plaintiffs, argued as follows:—The objections made by the counsel for the Defendant, are to the substance of the bill, and it is argued, that, upon the complainant's allegations, he has no case. For the purpose of deciding the present question, all the allegations in the bill are to be taken as true and well stated.

The allegations in the bill are in substance, that the Defendant with a fraudulent design misrepresented the value of his vessel when he applied for insurance. That after he sailed from St. Johns, he carelessly navigated, and voluntarily run his vessel on to Mud Island. That he afterwards bored the vessel, or caused her to be bored, and thereby caused her to fill with water; and thereupon caused her to be surveyed, condemned, and sold; and thus occasioned the loss of her. That he sued the Defendants, and they, being ignorant of all

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the matter aforesaid, were obliged to submit to a judgment against them, &c. That all these fraudulent doings came to the knowledge of the Defendants, since the said judgment was rendered. And the bill prays, that Fields should repay the amount of the judgment, that the judgment may be decreed void, and for other and farther relief.

The Defendant's objections are,

1st. That the bill charges a crime, for which the Defendant should be indicted; and it shows no case for remedy in law or equity. That a crime cannot be the ground and substance of a suit.

2d. That the bill is brought to set aside a judgment, and shows no sufficient cause. That it is like a bill of review.

By the the English law, it is in some cases said, if a man commits a felony, and thereby injures another man, or obtains his property, the injured man may not sustain his suit for damages against the felon, until he is prosecuted and convicted or acquitted. But this Court will not be governed by English Statutes. The object of this rule of law is to induce prosecutions for offences. But the Supreme Judicial Court of Massachusetts says, it is doubtful if such be the law in England, and it certainly is not law in this country. *Boardman v. Gore et al.* (15 Mass. R. 336). The doctrine that no civil action lies where the injury sustained is occasioned by crime, by common law, is not universally true (as our Court believe) in England. It is only true in cases of robberies and larcenies, which by the common law are felonies.

Another reason for the rule may be, that by common law, the Act of Felony forfeits all the felon's property to the crown, and it is fruitless to give an action, where there can be no property to satisfy a judgment. Such reasons do not exist with us.

Actions are every where sustained, in a variety of cases,

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where crimes occasioned the damages sued for. Such, among others, are actions for slander, and assault and battery.

The English cases referred to, are cases, where a remedy is sought for damages resulting immediately from the felony, as for a felonious assault and battery, &c. Ours is not a similar case. We seek relief, by having money paid back, which was wrongfully recovered; and to vacate a judgment obtained wrongfully, by suppressing facts. We do not allege, that the judgment was a crime. In this country, if A. make his note and forge the name of B. thereon as endorser, and sell it to C., at law, C. may maintain an action against A. on the note, or for money paid, though the forgery of B.'s name was the only inducement to C. to part with his money.

Again; it is the most common office of a Bill in Equity to seek for indemnity for frauds. Thus, money obtained by misrepresentations, or fraudulent papers, is recovered by proceedings in equity. So, also, fraudulent deeds are cancelled, and lands obtained by them are recovered by decrees in equity. So, equity grants relief not only against deeds, writings, and solemn assurances, but against judgments and decrees obtained by fraud and imposition. *Reigal et al. v. Wood* (1 John Ch. R. 402).

Thus, where a deed was obtained of the Plaintiffs by fraud by B., who confessed judgment to H., and Robbins innocently, and for a good consideration, bought the judgment with a lien on the land obtained by the fraudulent deed; it was decreed, that Robbins, though ignorant of the fraud, must reconvey the land to the Plaintiff. The land was thereupon discharged of the judgment, and a perpetual injunction laid against the execution of the judgment on that land. The fruits of the judgment were restored to the Plaintiff; but, as the judgment being by *H. v. B.* might be good, it was not revoked, but left to be satisfied on B's. property, if it could be found. *Livingston v. Hubbs et al.* (4 John. Ch. R. 512). So,

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where a judgment, which had been paid, was fraudulently kept alive, and satisfied by taking the Plaintiff's land ; the Defendants, who were assignees of the judgment, were decreed to release the land to the owners, to deliver up possession, and to pay rents, and profits, and for waste. *Troup v. Wood et al.* (4 John. Ch. R. 228).

Fraud and damages, coupled together, entitle the party to relief in equity. *Bacon v. Bronson* (7 John. Ch. R. 194). And indeed, a Court of Equity has an undoubted jurisdiction to relieve against every species of fraud. But fraud is so various, that it is difficult to enumerate and classify all the cases where the Court will relieve. (1 Story, Eq. Jurisp. 188, 189).

The Defendant says, that the Plaintiff must show, that new matter has arisen since the trial ; or that new proof has come to light, which could not *possibly* have been used at the trial, and that the complainants could not with due diligence have ascertained and proved the new fact, at the hearing ; or otherwise the bill is bad.

The bill alleges the frauds before named : avers that at the trial, they were unknown to the Plaintiff ; and that they have discovered them since the trial ; and all this is admitted by the demurrer ; or, for the purpose of the present hearing, are to be considered true.

The Defendants professed to object, that the bill is in substance bad : it was not supposed, they would take exceptions to forms, which, if well taken, might require amendment. But we insist, that the allegations in the bill are sufficient. It is not necessary in the bill to state the history of the discovery of new facts proving a fraud, which were not suspected at the time of the trial, nor the various efforts then made to discover the true history of the case. It will be enough to show, on the trial of this case, that due diligence was used at the former trial, and that such facts, showing a gross fraud, which

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was not then supposed to exist, have since been discovered.

What was proved at the former trial seems to us to have no bearing on the question now submitted to the Court.

If the Plaintiffs show, that the Defendant bored twenty holes through the sound and solid plank of the bottom of the vessel, and thus sunk the vessel, and that such proceedings were unsuspected, until the repairs of the vessel were undertaken, some time after the former trial, we think it will be for the Court to decide when the evidence shall be presented, (but not now), whether those injuries could with due diligence have been discovered, before the former trial.

The Plaintiff was bound, on the former trial, to use all *reasonable* diligence: not all *possible* diligence. For by *all possible* diligence, such as cutting up a vessel, every latent defect or injury in her could at any time be discovered.

But to present now, as far as practicable, every question, tending to show, whether the Plaintiffs can maintain any bill, we admit, that on the trial of this case, it will appear, that on the former trial, the Defendants alleged in defence the misrepresentation of the value of the vessel; and the attempt and design to cast her away on Mud Island, and failed to prove them. But we aver, that the distinct fraud of boring the vessel was not then alleged or suspected by us; and we admit, that if an unsuccessful attempt to prove a fraud at the former trial, takes from the Plaintiffs the right, now to show the same or other distinct and more gross frauds, we have no case.

We think this bill is not analogous to a bill of review, and that the authorities cited on that subject are inapplicable.

We think this is a case, merely of seeking relief from the consequences of a fraud; that the power of the Court to give relief in such cases is so well established, that it is needless to cite cases to show it. The objection, that the bill seeks to

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make the Defendant criminate himself, is not valid. Bills very generally charge fraud, and frauds are generally crimes either at common law, or by statute. The Defendant is always called on to answer the charges. If the latter objection is well founded, all Bills in Equity, charging fraud, are illegal, for they all seek to make the Defendant criminate himself.

STORY J. This case comes before the Court upon a demurrer to the bill ; and, of course, the demurrer admits the truth of the statements made in the bill, at least for the purposes of the present argument. The bill asserts, in substance, that the judgment recovered in this Court upon the policy of insurance in the case, was procured by the fraud of the defendant Field, which has been satisfied ; and that the loss of the vessel, upon which the recovery was had, was occasioned by the fraud of the defendant, in fraudulently casting away the vessel, and also in fraudulently boring holes in her bottom. There is, also, another distinct allegation, of a fraudulent misrepresentation of the value of the vessel insured, at the time when the policy was underwritten. The bill then goes on to allege, although not in a very precise and accurate form, that at the trial of the cause in this Court, the plaintiffs were "uninformed of the fraudulent intentions and practices of the said Fields" stated in the bill, and "were unable to prove the same, which were by the said Fields fraudulently suppressed and concealed," and, thereupon, the verdict was rendered against the plaintiffs. The bill farther alleges, that since the payment of the judgment, "they for the first time discovered and were informed of the boring of the holes, in the said vessel herein described, the same concerning ;" and, therefore, prays the interposition and relief of the Court in the premises.

Now, upon this posture of the case, all these allegations of misrepresentation and fraud must be taken to be true ; and if

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they are, they certainly do present a strong appeal to the justice and equity of the Court, unless solid grounds can be established to repel the conclusion.

What then are these grounds? No just objection exists as to the jurisdiction of the Court, because it is a suit between an alien on one part, and a corporation, all of whose members are citizens of some one State in this Union, on the other part; and, besides, this is a case to overhaul and set aside a judgment of this Court, which, perhaps, no other Court is competent to do to the same extent, and with all the same beneficial consequences, as may be here attainable.

The first objection urged against the bill, is, that it charges the defendant, Fields, with a crime, punishable, both by our law and the English law, with death; and that, under such circumstances, the bill is not maintainable. Now, in the first place, although, if the charge in the bill be of a public crime committed by the party, that may constitute a good ground against compelling him, personally, to a discovery thereof; yet it is by no means a sufficient reason in all cases, why, if the fact is made out by other proofs, the plaintiffs may not well be entitled to relief. It is by no means true, as a general proposition in the common law, that, because the act is a public crime, therefore the civil rights of other parties affected thereby are merged or suspended by the rights of the government to punish the same, even when the crime is a felony. The most, that can be said, is, that the common law requires, that before the party, injured by any felonious act, can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied, in respect to the public offence. But after a verdict of acquittal or conviction, and a judgment thereon, that judgment is so far conclusive in any collateral proceeding, *quoad* the subject-matter, that the objection is thereby removed to bringing that, *sub judicio*, in a

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civil action, which was the proper subject-matter of a criminal prosecution. So the doctrine was laid down by Lord Ellenborough, in the case of *Crosby v. Long* (12 East R. 409), in which he was supported by the whole court. In *Boardman v. Gore* (15 Mass. R. 331), the Supreme Court of Massachusetts held, that this doctrine had not been adopted in our country. Upon that point, it is not now necessary to pronounce any definitive opinion, although certainly the reasoning of the late learned Chief Justice, upon that occasion, has great force and strength in it. In *Cox v. Paxton* (17 Ves. 329), Lord Eldon recognized the doctrine of the courts of common law as strictly applicable in equity. But then the case there, was, that the plaintiffs made this title to relief against a third person through a felony committed against them by their own clerk, by an embezzlement of their moneys intrusted to him, and vested by him in certain life policies of insurance, which had been transferred by the clerk to the defendant, alleged in the bill to be with notice. Lord Eldon, upon a demurrer, thought the bill not maintainable, upon the ground, that the relief was to be reached through the felony of the clerk, and that an action at law would not lie to recover the moneys embezzled, if they had been in the hands of the defendant. That might be true, if the party had not been convicted or acquitted upon a criminal prosecution therefor; and there was no such allegation in the bill. But if he had been, I profess not to see very distinctly, what real objection lay to the bill. But upon this case, also, I give no opinion; because the present stands upon considerations wholly independent.

In the first place, the plaintiffs here do not claim title, through any felony committed by the defendant to maintain an original suit. Their case is the converse of that of *Cox v. Paxton* (17 Ves. 329); for theirs is purely matter of a defence to a suit brought originally by the defendant, in

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which he deduced his own title to recover, through an asserted fraudulent and felonious act on his part. There can be no possible doubt, that, if the plaintiffs had, in the suit at law, known the real facts, and had sufficient proofs thereof, they might have set up that very felony as a bar to the plaintiff's recovery in that suit. It is a case completely out of the mischiefs of the rule at the common law ; and it would be a monstrous doctrine to assert, that any person claiming a right to an action founded upon his own fraud and felony, could avail himself of it, and thus, by his own turpitude, exclude the other party from a perfect defence to the action. To such a case, the maxim of retributive justice is most properly addressed : *Allegans suam turpitudinem non est audiendus*. Now, the very reason, upon which the present bill is founded, is, that this, a perfect and valid defence at law, was, by the fraudulent concealment of the defendant, and the total ignorance of the plaintiffs in the facts, incapable of being set up to the original action ; and the recovery was, therefore, inequitable and iniquitous. It would be against all the principles of a court of equity, to allow one party to practice a fraud upon another innocent party, and by another act of fraudulent concealment recover a judgment against him founded upon the prior act ; and then to be permitted to assert this double iniquity as a bar to all equitable relief against the judgment. Upon this ground, alone, the objection would be unavailable.

But there is another and still more urgent and decisive answer to the objection. The bill states a case, where the felony, if any, was committed on board a British vessel by a British subject, within British waters. It is, of course, therefore, solely punishable by the British laws. Now, although this Court may judicially take notice of the common law and the crimes recognized therein ; yet, as to the statute law of Great Britain, now in force, or created since the Revolution,

it is difficult to perceive, how it can be judicially taken notice of, or established before the Court, except in the same manner and by the same proofs, as the criminal laws of any other foreign country.

Even supposing the present statute law of Great Britain could be judicially taken notice of by the Court, and the offence supposed be a felony by that law, it would not change the posture of the present case; because the criminal laws of a foreign country cannot be of any force, or be in any manner enforced in any other country, unless recognized by some treaty stipulation. Now, the common law of England does not apply the rule, that a civil action cannot be maintained for any injury or trespass, which involves a felony, unless it be a felony committed in, and cognizable and punishable by the courts within the realm. If it be an offence committed in a foreign country, there can be no merger or suspension of the civil rights of the injured party, until there has been a conviction or acquittal of the offender, for the plain reason, that there can be no trial thereof had in the tribunals of England; and, consequently, in such a case, the whole policy of the rule is completely swept away. Upon either ground, therefore, the objection fails of support.

Another objection is, that, although the bill charges, that the policy was procured by a fraudulent over-valuation, yet, it does not allege, that the facts relied on to establish it, were unknown to the Plaintiffs at the time of the trial; and that even if these things were properly alleged in the bill, yet they constitute no ground for equitable relief. Now, the bill is certainly not pointed and stringent as to the want of knowledge on the part of the Plaintiffs, as it should and ought to have been. It is not improbable, that the concluding allegation in the bill, that, since the payment of the judgment, the Plaintiffs were for the first time informed of the boring of the holes, &c., "and of all things herein alleged the same con-

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cerning," was thought to be sufficient to cover this particular matter, although it certainly does not. This charge, therefore, of the bill, if it constituted the whole equity, would, by reason of this defect, be insufficient to sustain it. But, if the charge were rightly framed, with the proper allegations, it would, in my judgment, constitute a complete title to relief. A fraudulent over-valuation and misrepresentation of the value of the subject-matter of insurance will avoid a policy of insurance; and if unknown at the time of the trial and judgment, is a proper case for equitable interference. Over-valuation, I agree, is no necessary proof of fraud; and far less, a positive statement of a sale bargained for at a high price in the port of destination. But there may be very cogent circumstances, from which fraud may be inferred, where the cause otherwise labors under strong suspicions. Besides; the demurrer with reference to this matter is merely argumentative, and addressed to the sufficiency of the proofs, and, therefore, seems in this respect to be of the character of a speaking demurrer. However, if the other charges in the bill can stand, and sustain it, the demurrer must be over-ruled.

Then, as to the main objection, on the ground of the fraudulent casting away of the vessel, and especially of boring holes in her, it is suggested, that in point of fact, the defence of fraud was made at the trial, and did not prevail. Assuming that it was so, still, as the bill admits nothing of this sort, but charges that the facts were unknown until after the judgment, this Court cannot upon demurrer travel out of the allegations of the bill. The office of a demurrer is to bring before the Court the right to maintain the bill upon the admission *pro hac vice* of the entire truth of all its allegations; and the Court cannot look *alimunde* to search out or conjecture, what other facts might or did exist to defeat the bill. That is the proper office of a plea or answer.

But the parties admit, for the sake of the argument, that

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the point of fraud was made at the trial ; but that it was in effect founded upon circumstances of suspicion, not sustained by any clear and satisfactory proofs ; and that the boring of the holes was not known or suspected at the trial ; and that it was not and could not therefore then be a matter of controversy. Now, I agree, that mere cumulative evidence to the fact of fraud or any other leading fact not discovered since the trial, will not ordinarily constitute any just ground for the interference of a Court of Equity to grant relief, for the solid reason, that it is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great Jurist, that suits may not be immortal, while men are mortal. But I do not know, that it has ever been decided, that, in an assignable case, where the defence has been imperfectly made out at the trial, from the defect of real and substantial proofs, although there were some circumstances of a doubtful character, or some presumptions of a loose and indeterminable bearing before the Jury, and afterwards newly-discovered evidence has come out, full, and direct, and positive, to the very gist of the controversy, a Court of Equity will not interfere to grant relief and to sustain a bill to bring forth and try the force and validity of the new evidence. My recollection does not furnish me with any case, where a doctrine so strict and so binding has been positively upheld and pronounced. The disposition of Courts of Equity, upon this head, seems, as far as I can gather it, not to encourage new litigation in cases of this sort ; but, at the same time, not to assert their own incompetency to grant relief, if a very strong case can be made out. *A fortiori* all reasoning upon such a point must be powerfully increased in strength, when it is applied to a case, which, upon the face of the bill, is composed and concocted of the darkest ingredients of fraud, if not of crime. At all events, it would be an extraordinary course for a Court of Equity to pronounce such a judgment in such a case upon

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a demurrer, rather than to retain it for a final adjudication upon a hearing of the merits, where the full pressure of the whole facts, and the weight of all the attendant circumstances known at the trial and discovered since, may be fully brought before it. While the Court would not be disposed lightly to interfere with the verdict of the Jury, upon the point of fraud, it might well deem itself at liberty to look deeper into the case upon new evidence which might justly, if known at the time, have changed the verdict of the Jury.

I agree, that there is a strong analogy between bills of this sort and bills of review, as to newly-discovered evidence ; although there may possibly be some ground for a distinction, in favor of the former bills, founded upon the consideration, that they approach somewhat nearer to the analogy of motions for a new trial. The subject was a good deal considered by this Court in *Dexter v. Arnold* (5 Mason, R. 309) and *Wood v. Mann* (2 Sumner, R. 316, 324, to 336), where it will be found, that the principal cases are reviewed. It does not appear to me, that it can be laid down as a positive rule, that in no case whatsoever ought relief to be granted, however stringent the evidence may be, which goes to establish the fraud asserted, but imperfectly brought out at the trial, from the mere defect of evidence without laches of the party seeking relief in Equity. But in the present case, I am not prepared to say, that the very fraud now preferred in the bill was identical with that propounded at the trial. Fraud in casting away a ship may be very distinguishable from fraud in destroying her by boring holes in her bottom. Both may concur and be concomitant circumstances of the same general transaction : but they may also constitute distinct and independent transactions and matters of defence. How can a Court of Equity, upon a dry demurrer, assert, that they are the one, rather than the other ? If I were compellable to decide upon the face of this bill, what in this case was the real proximate cause of the

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loss and destruction of the vessel, I should say, that it was not the casting away of the vessel, but the boring of the holes in her bottom. But it is unnecessary to decide that, because upon a demurrer, *in odium spoliatoris*, the Court will not decide a matter of such importance in his favor, but reserve it for a final hearing upon the merits.

Objections have been urged to the frame of the bill in other respects ; that it does not contain any allegations of due diligence to ascertain these facts before the trial, and that the Plaintiffs have lain by and been guilty of gross negligence and laches. That may be or may not be made out upon a final hearing of the merits. But the bill asserts that the boring of the holes was unknown until after the judgment ; and the Court cannot presume that it could by any prior, seasonable diligence, have been established. If it might have been discovered by such vigilance, it is more properly a matter of defence, than of allegation in the bill.

Upon the whole, my opinion is, that the Demurrer ought to be over-ruled.

ISAAC W. ARTHUR, AND OTHERS, LIBELLANTS AND APPELLANTS v. THE SCHOONER CASSIUS.

WHERE the schooner Cassius was chartered to the master, as owner, for a certain voyage, and by the terms of the charter-party, the general owners were to share the freight with the master,—*It was held*, that the general owners were directly liable, as owners, for the voyage; and that the claim of the shippers for damages was not restricted to the master personally, although their agreement was made solely with him.

Where, also, the master was, by his agreement with the shippers, to deliver the cargo at Velasco, but upon his arriving there, the consignee refused to receive it,—*It was held*, that, as the cargo was not of a perishable nature, the master was bound to land it at Velasco, and store it for the benefit of the shippers, and could not carry it to another port, nor sell it; although it could not be sold at Velasco.

So, also, where freight was payable "on delivery of the cargo at the port of Velasco,"—*It was held*, that until such a delivery, no freight could accrue; and that the master should have landed the cargo, and secured his lien for freight by placing it in the hands of his agent for the benefit of the owners, but subject to the freight.

But as the master had carried the cargo to New Orleans, and sold it, *it was held*, that the libellants were entitled to receive the actual value of the cargo at Velasco at the time when the same might have been there landed, deducting all duties and charges, and the freight for the voyage, as if the cargo had been duly landed.

The rule of damages in prize cases ordinarily supposes, that the vessel has been captured before she has arrived at the port of destination, and the Court, *in odium spoliatoris*, will presume the cargo to be worth more at the port of destination than the prime cost by 10 per cent. But to cases where the vessel has arrived at the port of destination this rule does not apply.

LIBEL on a charter-party, *in rem* against the schooner, and *in personam* against the master. The libel, in substance, stated:—

1st. That Simon E. Cottrell, master of the schooner Cassius, on the third day of October, 1838, by a certain charter-party of affreightment at New York, annexed to the libel, made and concluded between him and the libellant, en-

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gaged to take and receive on board the said schooner a cargo of white pine and hemlock, and lumber, both under and on deck, and all such lawful goods and merchandize as the libellants might think proper, to ship and transport the same from said New York to the port of Velasco, in Texas, by the way of Kingston on the North River.

2d. That it was engaged, among other things, that the libellants should pay to the said Cottrell for the freight or charter of the said vessel at the rate of fifteen dollars for each thousand feet of inch-board measure on delivery at the port of Velasco, in conformity with the bills of lading, with five per cent. primage, such payment to be made in the manner specified in the said charter-party. It was also agreed, among other things, that no freight should be paid on such part of the cargo, if any, as might be lost in rafting the same on shore.

3d. That on the 17th of October, 1838, in pursuance of the said contract, the libellants delivered and shipped on board the *Cassius*, the following goods and merchandize: 47,755 feet hemlock and pine lumber; 29,836 feet hemlock boards, siding, &c.; 9 boxes doors, door-casings, &c.; 10 boxes window-glass; 1 box books, stationary, &c.; 1 Franklin stove; 1 box stove; 43 pounds of pipe; 3 boxes paste blacking; all of great value, to wit, of the value of \$1561, for which the said Cottrell signed four bills of lading, in the usual form, stipulating to deliver the same to one Morgan L. Smith, upon payment of freight, according to the said charter-party, with primage and average.

4th. That soon afterwards the vessel set sail and arrived at Velasco on the 9th day of November, 1838, and that the said Cottrell did not deliver the said cargo to the said Smith, but set sail and went to New Orleans, and there sold it and received the proceeds and still retains the same.

5th. That the libellants have always well and truly per-

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formed their covenants and undertakings, but that the said Cottrell has not, by not delivering the said cargo to the said Smith.

6th. That, by reason of such non-delivery, the libellants have lost not only all the profits, which they would have received, if the said cargo had been delivered, but also the whole value of the said cargo; and that the said Cottrell wholly refuses to pay them the amount of their damages, or the value of the cargo, or the proceeds of its sale in New Orleans, and that their damages amount to a large sum of money, to wit, \$3000.

Whereupon the libellants pray, that process may issue against the said vessel, and that the said Cottrell and all other persons interested be cited to appear, and that the Court will pronounce the damages aforesaid, and decree such other relief to the libellants as shall to law and justice appertain, and condemn the said vessel and all persons intervening, in costs.

The Answer of the master stated, as follows :

1st. That the respondent was authorized by the owners of the schooner *Cassius*, and had made an agreement with the said owners, to victual and man the said schooner, and to receive for compensation therefor, and for his own services as master, one half the freight earned by the schooner, and the other half to be paid to the said owners.

2d. The respondent admitting the several matters in the first, second and third articles of the libel to be true, except the valuation of the goods, farther alleges, that the *Cassius* set sail and arrived at Velasco on the 9th day of November, 1838, as set forth, and that upon her arrival, the said Morgan L. Smith, consignee of the cargo, came on board with a pilot, and instructed the respondent to raft the said lumber ashore, as the said pilot should direct, and that the said pilot thereafter directed the mode in which the said lumber should

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be rafted ashore, and about twelve thousand feet of lumber were made into a raft and towed ashore, as nearly as practicable, pursuant to his directions, and then left to drift ashore; and that the same raft was safely landed, and was hauled out of the water by men in the employ of the said Smith, who was himself present. That afterwards, before any more could be so rafted ashore, the said Smith gave notice, that he would receive no more of the lumber, and would not pay any freight thereon in case it should be landed, and advised the respondent to throw it overboard, as, in that case, he could call on the underwriters, he being fully insured, and the respondent could also receive from the underwriters the amount of his freight; and that the said Smith asserted to the respondent, that there was not money enough in Velasco to pay the freight for the said cargo; and that the winds and weather were as favorable for landing the remainder of the said lumber as they were when the raft was landed; and that the said Velasco is a small and poor place, containing not more than twenty-eight houses, and not more than one hundred and twenty-six inhabitants, and that there was no market at Velasco for the said lumber, and that the same could not have been there sold for sufficient to pay the freight agreed upon by the charter-party; whereupon the respondent set set sail for New Orleans, that being deemed to be the best port to make with such a cargo, with the residue of the cargo on board, and there sold the same, and the net proceeds of the sale amounted to \$1277.16.

3d. That the respondent has well and truly performed his covenants and undertakings, inasmuch as he had no means in his power to compel the said Smith to receive the said cargo, and to pay the freight thereon, and was not bound to part with the possession of the said cargo, until the said freight was paid; and the respondent avers, that he was ready and willing, and offered to deliver the said cargo according to the

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terms of the charter-party ; but that the said Smith would not receive it, nor pay freight, and, therefore, that the libellants did not well and truly perform their covenants and agreements in the said charter-party, and in consequence thereof, the respondent was compelled to convey the cargo to New Orleans, and there to sell it.

4th. The said respondent denies, that the libellants have lost any profits upon the said lumber, and avers, that it could not have been sold at Velasco for enough to pay the freight, and the respondent claims, to be paid by the libellants, the amount of freight according to the term of the charter-party, to wit, \$1291.50, and the farther sum of \$800 for the detention and delay at Velasco, and for transporting the cargo to New Orleans, and he claims to hold the whole proceeds of the sale of the said lumber at New Orleans, to pay the sum due to him from the libellants ; and he prays the honorable Court to decree, that the balance remaining due to him from the libellants, shall be by them paid to him ; and he denies that the libellants have suffered any damages. Wherefore he prays the Court to pronounce against the libel and condemn the libellants in costs.

The answer was subsequently amended, by stating, that the box of books and stationary, and the three boxes of paste blacking, were not sold with the cargo at New Orleans, but were sent to the said Smith by the schooner William Bryant, from New Orleans, and the stoves and pipe were not sold, and that their value when taken on board at New York, was about twelve dollars, and that in addition to the proceeds of the said sale, the said stoves and pipes are insufficient to pay to the respondent the amount due to him, and, therefore, he claims to hold them.

The Answer of the owners corresponded in substance to the answer of the master, and stated, that by the agreement existing between them and the said master, the said master

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was owner, for the voyage, of the said schooner, and as such owner solely responsible for all contracts relative to the same, and that the owners are not liable for any default, neglect, or other liability of the said master in relation to the said voyage; that the owners never received any account from the said Cottrell, nor from any other person during the time in which the schooner was performing her said voyage to Velasco, any more than the sum of \$638.58, except that they received from the said Cottrell the said stoves and pipes, and that they, the owners, insist that they are entitled to the said sum, and the said stoves and pipes, as having been paid and delivered by the master under his contract with them.

There was evidence tending to show, that the consignee, subsequently to his refusal, offered to receive the cargo.

At the hearing in the District Court, there was a decree dismissing the libel, and from that decree an appeal was brought to this Court.

The cause was now argued by *F. C. Loring* for the libellants, and by *William Gray* for the respondents.

For the libellants it was contended as follows:

The matters put in issue by the pleadings are, 1st, the cause of the departure from Velasco; 2d, its sufficiency in point of law to excuse the departure.

The respondents allege, 1st, that the consignee refused to receive the cargo at Velasco; 2d, that it could not be sold there for enough to pay the freight; and then argue that the master was justified in taking the cargo to New Orleans and selling it there, and has the right to retain the proceeds in payment of the freight stipulated to be paid on the delivery at Velasco.

The libellants deny both the fact and the law.

The alleged refusal of the consignee to receive the cargo is relied upon as the main ground of defence.

The proof of this is drawn from an abandonment, made by

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him to the insurers on the cargo, on account of the unfortunate result of an attempt to land a part of it, and the state of the weather, and from some testimony, as to a refusal by the consignee to pay the freight.

The abandonment was a matter between the shippers and insurers, which did not in any wise affect the master, nor discharge him from his contract to land the cargo according to the charter-party.

The testimony as to the refusal to pay the freight is by no means satisfactory or unequivocal, and is entitled to little weight.

But however this may be, it is fully proved, that afterwards, the consignee urged the master to wait for a favorable opportunity and land the cargo, and promised to pay the freight if landed according to the charter.

If there had been a refusal, it was fully retracted, and the parties stood as if none had been made.

But if the consignee did refuse, the question remains whether the master was thereby justified in leaving the port, taking the cargo to another port and selling it.

By the maritime law, the shippers are bound to pay the freight. The consignee is not, unless he receive the goods.

The master is bound to carry and deliver the cargo, unless prevented by perils of the seas. He is a mere carrier, having no interest in the cargo, or the result of the adventure ; if it arrive at a poor market, it does not diminish his freight.

By the charter-party, the owners, not the consignee, were to pay the freight : he therefore did not look to the cargo, and had not even a lien upon it for the freight. His duty was simply to deliver the cargo according to his contract, and look to the charterers for the freight. If after delivery the consignee had refused to give the stipulated bills on the charterers for the freight, he might *perhaps* have had the right to sell enough to pay it : at any rate, he would have earned his

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freight ; and if the consignee had then refused to receive the cargo, the loss would have fallen on the owners, and not on the master. Marine Ordinances, book 3, tit. 3, sec. 517 ; *Chickering v. Fowler* (4 Pick. 372) ; Story on Bailments, p. 340—350.

As to the allegation, that the cargo, if landed, could not have been sold for enough to pay the freight : the fact, if proved, would be wholly immaterial, especially as the freight was payable in New York, and could not be affected by the state of the market at Velasco : but the evidence shows, that if landed in good order, it could have been sold at a large profit, and for much more than the freight.

The testimony to the contrary, comes from persons, who evidently have no knowledge as to this matter.

This is the defence set up in the answer ; but there is a fact in the case, not stated in the answer, which explains the conduct of the master in going to New Orleans, and clears up the mystery which otherwise overhangs the proceedings at Velasco.

It appears from the testimony of various witnesses, and also from the protests made by him, that he was alarmed for the safety of his vessel, while lying off Velasco ; that he considered her to be in a dangerous situation, and did not deem it prudent to remain there longer.

There can be no doubt on the evidence, that this was the true cause for the departure : and none, but that this fear was without just cause ; and, that if the vessel were seaworthy, it would have been perfectly safe and prudent to have remained, until a favorable opportunity should occur to land the cargo.

It was not the alleged refusal of the consignee to receive the cargo, nor the state of the market at Velasco, but an unfounded fear for the safety of his vessel, which induced him to go to New Orleans, against the remonstrance of the consignee.

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And if this be proved, there can be no question as to the liability of the owners to indemnify the shippers for the loss occasioned thereby.

As to damages, the authorities seem to establish the rule, that where the cargo has not been delivered at the port of destination, the amount to be recovered shall be the value at the time and place of shipment, with the addition of ten per centum and interest. *The Lively* (1 Gallison, 327); *Wheelwright v. Beers* (2 Hall, 391); *The Amiable Nancy* (3 Wheaton, 327); *Smith v. Richardson* (3 Caines, 219); *Bridge v. Austin* (4 Mass. 115); *Dusad v. Murgatroyd* (1 Wash. C. C. Rep. 13); *Gilpins v. Conseequa* (Peters, Circ. C. Rep. 86); *Willings v. Same* (Peters, C. C. Rep. 172); *Youqua v. Nixon* (Peters, C. C. Rep. 221); *The Lucy* (3 Rob. 208).

No deduction is to be made for freight, as the cargo was not delivered according to the charter-party. *Lawes on Charter Parties*, 148; *Abbott on Shipping*, 273. Delivery precedes the right to demand freight; *Logs of Mahogany*, (2 Sumner 601). No *pro rata* freight was earned; the libellants derived no benefit from the carriage to New Orleans, and none can be claimed for the raft landed, because it does not appear that it was landed according to the charter-party, nor in good order, nor how much was landed, and because the contract was to deliver the whole and not a part.

For the Respondents, it was contended as follows:

The charter-party was merely a personal contract between Simon G. Cottrell and the shippers, and no liability attaches to the owners of the schooner. Cottrell was the owner for the voyage. *Taggard et al. v. Loring*, (16 Mass. R. 336;) *Abbott on Shipping*, page 22, ed. 1829. And as such, neither the general owner nor the vessel is liable for his acts. We concede, as a general proposition, that the ship is bound to mer-

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chandize, and merchandize to the ship. Abbott on Shipping, 93 ; *Volunteer and Cargo*, (1 Sumner, 557). But we contend, that this principle does not extend to cases where the general owner is not the owner for the voyage. It is well settled, that a lien on a cargo for freight may be displaced by particular circumstances, which denote a clear and determinate abandonment. *Logs of Mahogany* (2 Sumner, 589). If, therefore, a lien for freight may be displaced, so may a lien upon the vessel ; and we take the position, that where the owner for the voyage is distinct from the general owner, the lien is displaced.

If the owners have made a special contract for the employment of a ship, as was the case here, the master cannot substitute another contract. Abbott on Shipping, 99. The owner is not liable for goods clandestinely taken on board. *Walter v. Brewer* (11 Mass. R. 99). In *Kleine v. Catara* (2 Gall. 68), the Court say, that where the charterer becomes owner for the voyage, there is no lien of the general owner for freight. It is confined to cases where the carrier for freight is the owner for the voyage. The rights are reciprocal ; if the general owner has merely a personal action, the shipper should have no more. Now, Cottrell was the owner, and the general owners never received more than \$638.58, and the stoves and pipe, valued at \$12 ; and yet it is sought to make them responsible for the whole.

If, however, the Court is of opinion, that the owners of this vessel are liable, then we come to the merits. The making of the charter-party, loading the vessel, and arrival at Velasco, are not disputed. The libellants' ground of action is upon non-delivery at Velasco, going to New Orleans, selling cargo, and retaining proceeds. The non-delivery, sale, &c., are admitted ; but the reasons assigned for this course, constitute the defence. These are, 1st. That the consignee, who was owner, or agent for the owners, refused to receive the cargo, and to pay the freight according to the charter-party. 2. That

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the cargo could not have been sold at Velasco for enough to pay freight.

What, then, are the principles of law which govern such a case? The master has a lien upon a cargo for freight, and is not bound to part with the cargo until the freight is paid. Abbott on Shipping, 247, 273; *Bradstreet v. Baldwin* (11 Mass. R. 229). An express contract is no waiver of lien. *Peyroux et al v. Howard et al.* (7 Peters, 324). *Volunteer and Cargo* (1 Sumner, 557). It cannot be denied, that he has such lien upon the cargo, and, as a necessary result, has the right to retain it. If, therefore, the master forward goods, or be prevented or discharged from so doing, he is entitled to his whole freight. *Hunter v. Prinsep* (10 East, 394). If the consignee refuse to receive the cargo, the master may, by authority of a magistrate, sell a part for payment of his freight, and deposit the rest in a warehouse. Valin Ord. Mar. book 3, tit. 3, art. 17. The voyage being performed, and the master ready to deliver the cargo, he is entitled to freight. 1 Johns. R. 213, 14; 3 Johns. 319; 2 Johns. Cases, 371; Abbott on Shipping, note, pp. 288 and 298. *Morgan v. Ins. Co. N. America* (4 Dallas, 455). If it could not be sold, he would have a right to carry it to the nearest and most convenient port.

But if the cargo could have been sold at Velasco for enough to pay freight, yet, after the refusal of the consignee to accept, the master became agent for the owners of cargo; and the owners of the vessel are not responsible for his acts in that capacity. Then if the master had no right to go to New Orleans, we say, that after the cargo was carried to Velasco, and the consignee refused to receive it, the master thereupon became the agent of the shippers, and his acts in that capacity cannot affect the owners. *The Sarah Ann* (2 Sum. 206, 210); *The Gratitude* (3 Rol. 240); Phill. on Ins. i. 192; *Stocker v. Harris* (3 N. R. 417); Phill. on Ins. i. 471;

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Waldens v. Ph. Ins. Co. (5 Johns. R. 324, 5); *Young v. Smith* (3 Dana, 92). If the consignee refuse to receive the cargo, the master must act as agent for the owners; that is, he alone is accountable to them.

It may become important to consider where is the burthen of proof; and, in such case, if we show a refusal to receive and pay freight, and the libellants rely upon a waiver, they take the *onus*.

STORY J. This cause has been very fully argued upon the appeal. The merits of the whole controversy mainly turn upon the following points. 1. Whether there was in fact a final refusal on the part of the consignee at Velasco to receive the goods there. 2. If there was, whether the master had a right, under all the circumstances, to carry the same to New Orleans, and there to make sale of them on account of the shippers. 3. If the respondents fail, on these points, to make out a satisfactory defence in proof, whether, as owners of the *Cassius*, they are responsible for damages to the libellants. 4. If they are so liable, what should be the rule and measure of the damages.

In respect to the liability of the owners of the *Cassius* (who have intervened for their own interest) in this suit, I have no difficulty. The charter-party is in no just sense a mere personal contract of the master. It contains an express stipulation, pledging not only the personal security of the master, but also the *Cassius* and her freight and appurtenances, for the due fulfilment of the covenants of the charter-party on his side. Now, if the master was, as the owners of the *Cassius* by their answer assert, owner for the voyage, under a special agreement with them, I do not perceive, why he is not to be deemed so for all purposes whatsoever, and to have a perfect right as such owner to pledge the *Cassius* for the due fulfilment of the charter-party. If, on the other hand,

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the general owners were owners for the voyage, as I am of opinion upon their own statement of their agreement with the master, they ought to be held to be, then the Cassius is liable upon the charter-party, which is not denied to have been only authorized to be made for the voyage therein stated. What was that agreement, as stated in the answers both of the master and the owners? That the master "should employ and navigate the Cassius, and victual and man her, and should be entitled to retain *as his compensation therefor, and for his own services as master*, one half of the freight, which should be earned by the Cassius, and he was to pay the other half of the freight to the owners of the said schooner." The owners, then, were, upon acknowledged principles of law, jointly interested with the master in the freight; and jointly responsible with the master to the shippers, as partners or part owners in the freight and profits of the voyage (the gross freight); or he was to receive the half freight in lieu of and as a compensation for his services as master, and then the owners were directly liable as owners for the voyage, as well as general owners. In either view, the case would fall within the principles applicable to the jurisdiction of Courts of Admiralty by proceedings *in rem* upon charter parties, which were recognized in the case of *The Volunteer* (1 Sumner, 550), with which I have not since seen any reason to be dissatisfied. The case of *Taggard v. Loring* (16 Mass. R. 336) has been cited at the bar as establishing, that the master was owner for the voyage. That case is distinguishable in its actual circumstances from the present. The agreement in that case does not appear from the statements of the Report to have been identical with the present. And if it were, I must say, that I should have some difficulty in acceding to the authority of that case, if it meant to establish, that the master had an exclusive special ownership in the ship for the voyage. I should rather incline to the opinion, that if

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he had any ownership at all for the voyage, it was in common with the general owners. In the present case there does not appear to be any distinct proof of what the agreement between the owners and master was. None is produced in writing, and none is established in the testimony. It rests wholly upon the answers of the owners and master, whose statements on such a point, even if responsive to the allegations of the libel (which they are not), would not of themselves, in a Court of Admiralty, be satisfactory evidence. Besides; there is this additional consideration, that the charter-party, in this very case, was executed by the master in his character as master, and not as charterer and owner for the voyage. The respondents have admitted in effect, that he was entitled to make the charter-party; and they held him out to the public, from the nature of this employment, as a freighting vessel, as having general authority to bind the owners on a freighting voyage. The secret agreement, therefore, between the master and the owners, as to the shares of the freight between them, or the rights of the master in the navigation and control of the vessel, cannot, as they were not made known to the charterers, bind them, or vary their rights against the general owners. This objection, therefore, in every view is unmaintainable.

Then as to the merits of the case. In the first place, was there any absolute, positive, and final refusal of the consignee to receive the cargo? There certainly is something in the conduct and management both of the master and the consignee in respect to their proceedings at the port of Velasco, which is exceedingly suspicious, and mysterious, not to say, which gives rise to great doubts, whether there was not some connivance between them for purposes adverse to the interests of the charterers, on whose account the shipment was made. It has been suggested at the argument, that the consignee was, or at least might fairly be presumed to be, the real

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owner of the shipment. I see no sufficient foundation for such a suggestion in the facts of the case. It is repugnant to the apparent objects and intentions of the charter-party; and if the consignee had been the intended shipper in the original enterprise, it is inconceivable, why he was not made a direct party to the charter-party. His conduct at Velasco, while it may furnish some reason to doubt (if the evidence is believed) his good faith to the charterers and shippers, cannot be admitted to control their rights or change their property without their knowledge and adoption of all his conduct. It is said, that he might have been made a witness in the cause on the part of the libellants. Perhaps he might, but certainly not without a release, which, if he has sacrificed their interests, they would be very unwise to give. On the other hand, the respondents could have used him as a witness without a release; and if they meant to rely upon his being the owner of the shipment, it was their own fault not to take it, or to exhibit other proofs of the fact, since it is properly a matter of defence to the suit.

The conduct of the master in signing two protests, each of which was false in its statements, as he in his answer on oath now admits, is utterly without excuse. It was done in connivance with the consignee, under the pretence on his side, (as his letter to the master shows), that the landing of the cargo was either impracticable, or so dangerous and expensive, that the whole might be abandoned to the underwriters, and thus the loss thrown on them; when in point of fact, as all the evidence now in the case conclusively shows, the landing might have been effected without danger or difficulty. These protests were drawn up and signed by the master for the purpose of giving this very gloss to the transaction. Neither of these protests alludes in the slightest manner to the refusal of the consignee to receive the cargo. On the contrary, both of these protests, as well as the letter of the

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consignee, put the case upon the other ground. But I cannot but entertain some suspicion, founded upon the positive evidence in the case, that another motive had its operation upon the mind of the consignee, that is, a desire to have the cargo landed and sold by the master at auction on account of the underwriters, so that it might be bought in at a low price for his own benefit. Be this as it may, for such has been the conduct of these parties, that I cannot judicially repose confidence in their acts or statements, if Capt. Hendley is to be believed, (and I do not well know, what reason to assign, why he should not), it is certain, that the consignee did subsequently offer to receive the cargo and comply with the charter-party, nay, did require, that the cargo should be landed, and the master refused to land it, alleging the dangerous situation of his vessel and the extreme difficulty, if not impracticability, of so doing. Now, even if the consignee did at first refuse to receive the cargo ; yet, if before the departure of the *Cassius* from the port he was willing and ready to receive it, it was the duty of the master to proceed and land it. If he could have landed it, (of which there is now no doubt), and he did not, it was a plain breach of the contract. It was an idle pretence to suggest, that the cargo could not be sold at Velasco for the want of sufficient money to be had to pay for the same. That was nothing to the master. The freight was not payable in money at Velasco, but was payable by a bill to be drawn by the consignee on New York. It was, therefore, wholly immaterial to the master, whether the cargo could be sold at Velasco, or not. In this view of the case there was a clear breach of the charter-party, by the master, in the non-delivery of the cargo at Velasco.

But, suppose, in the next place, there was a final refusal to receive the cargo, by the consignee, did that authorize the master to carry it to New Orleans ? The learned counsel for the Respondents has insisted, at the argument, that it did. I

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agree, that in cases of necessity, the master becomes, by mere intendment and authority of law, the agent of all concerned, as well of the owners of the cargo, as of the ship — *ut res magis valeat quam pereat*. But this right of the master is to be clearly made out by unquestionable proof of such necessity. In the present case, the cargo could have been landed at Velasco, which was the port of destination. Then there was no necessity of carrying it elsewhere. It is said, that it could not have been sold at Velasco, for want of money in the hands of purchasers. Be it so. But there was no necessity of any sale; the cargo was not perishable; and, therefore, the sale would have been unjustifiable on the part of the master; since it would not have been a sale of necessity. The cargo might have been landed and stored, and kept until the charterers at New York could have received information, and given orders as to what should be done with it. But it is said, the master was not bound to give up the cargo before his freight was paid or secured according to the charter-party; and that he had a right to retain it for the lien created by law. Assuming, that such a lien existed under the terms of the present charter-party, still it is perfectly clear, by the language of the same instrument, that the freight was payable only "on delivery of the cargo at the port of Velasco," and "that no freight was to be paid on such part of the cargo, if any, as may be lost in rafting the same on shore." So that until a right delivery on shore, no freight could accrue due. If the consignee refused to receive the cargo after it was landed, and to give the bill on New York for the freight, then it became the duty of the master to place the same in the hands of some trustworthy person for the security of his lien for the freight, and, subject thereto, for the benefit and account of the owners. But no right, even under such circumstances, could exist on the part of the master to sell the cargo, unless it was perishable, and might otherwise have been lost

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or have perished, which is not proved or pretended by the answer. *A fortiori*, if the master had no right to sell at Velasco, because there was no necessity therefor, he could not have a right to carry the cargo to New Orleans and sell it there; since it is just as clear, that there was no necessity therefor. This act, therefore, in carrying it to New Orleans, was a gross breach of his duty, and the sale a tortious conversion of the property. It might, perhaps, have admitted of a very different construction, if the cargo could not have been landed at Velasco, or there deposited in safety for the owners; or if the sale at Velasco or at New Orleans had become indispensable from the perishable nature and condition thereof. Such a case has not been made out; and, therefore, it need not be decided upon the present occasion.

It appears to me, therefore, clear, that the non-landing of the cargo at Velasco, and the carrying of the cargo to New Orleans, and the sale thereof in that port, are all breaches of duty on the part of the master, for which the Respondents are liable.

The only remaining question is, as to the rule and measure of damages. It appears to me, that, as the cargo safely arrived at Velasco, and might have been landed there, but from the misconduct of the master, the Libellants are entitled to recover the actual value thereof at Velasco, at the time when the same might have been there landed, deducting all duties and charges, and the freight for the voyage, as if the cargo had been duly landed. It is said, that no freight was due, because there was no delivery thereof. That is true. But still the cargo was carried there, and if it had been rightly delivered there, the freight would have constituted a charge upon the value in that port. So that, if the Libellants are to take the value there, as I think is the true rule, they are to be, as to that value, in the same state and condition as if the cargo had been duly landed, and not in a better state and condition.

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The rule, adopted in cases of prize, of ten per cent. upon the prime cost, is not applicable to cases like the present. That rule ordinarily supposes, that the vessel has been captured, before she has arrived at the port of destination, and then the Court in *odium spoliatoris* will presume the cargo worth more at the port of destination than the prime cost by ten per cent. ; which used to be the old rule of estimating the fair and reasonable profits in ordinary cases, after deducting all charges. But where the vessel actually arrives at the port of destination, in cases like the present, the loss, if any, is susceptible of a more exact computation, by its true and real market value there.

I shall, therefore, refer it to an assessor, to ascertain the value of the cargo at Velasco, deducting the freight and duties, and all other proper charges ; and the Libellants will be entitled to recover the difference, as the true amount of their loss, with costs. The Decree of the District Court is, therefore, reversed ; and the final Decree will be entered according to this opinion.

As the master has died pending the proceedings, and no revivor of the suit, as to him, has been moved for, it is unnecessary to consider whether a proceeding *in rem* and *in personam* can be instituted in the Admiralty in a case of this sort. The Libel must be treated as defunct, so far as the master is concerned.

at 60.
The 11th to

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CHARLES FOLSOM AND OTHERS

v.

BELA MARSH AND OTHERS.

AN abridgment, in which there is a substantial condensation of the materials of the original work, and which requires intellectual labor and judgment, does not constitute a piracy of copyright; but an abridgment consisting of extracts of the essential or most valuable portions of the original work is a piracy.

An author of letters or papers of whatever kind, whether they be letters of business, or private letters, or literary compositions, has a property and an exclusive copyright therein, unless he unequivocally dedicate them to the public, or to some private person; and no person has any right to publish them without his consent, unless such publication be required to establish a personal right or claim, or to vindicate character.

The government has, perhaps, a right to publish official letters addressed to it, or to any of its departments, by public officers; but no private person has such a right, without the sanction of the government.

To constitute a piracy of an original work, it is not necessary, that the whole or the larger part of it should be taken; but it is only necessary, that so much should be taken as sensibly to diminish the value of the original work, or substantially to appropriate the labors of the author.

Where A. published a "Life of Washington," containing 866 pages, of which 353 pages were copied from Sparks's "Life and Writings of Washington," 64 pages being official letters and documents, and 255 pages being private letters of Washington, originally published by Mr. Sparks, under a contract with the owners of the original papers of Washington,—*It was held*, that the work by A. was an invasion of the copyright of Mr. Sparks.

BILL in Equity for piracy of the copyright of the writings of Washington. The Bill in substance stated, That Jared Sparks was the author of a work entitled, "The Writings of George Washington, being his correspondence, addresses, messages, and other papers, official and private, selected and published from the original manuscripts, with a life of the author, notes, and illustrations, by Jared Sparks," consisting of 12 volumes, of all of which the copyright was duly taken out, the term of

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which copyright has still more than eight years to run. That the Plaintiffs, Charles Folsom, Thomas G. Wells and Lyman Thurston, printers and publishers, under the style of Folsom, Wells and Thurston, had assumed a part of the risk and responsibility of publishing the said work, and that being in the receipt of large sums, the proceeds of the sale of the said work, Bela Marsh, Nahum Capen, Thomas B. Webb, and Gardner P. Lyon, booksellers, under the firm of Marsh, Capen and Lyon, and Charles W. Upham, all well knowing that the said Sparks held such copyright, and that the said Folsom, Wells and Thurston, were interested as aforesaid, and deliberately, after due notice, intending to infringe upon the said copyright, at Boston, on August 5th, 1840, and at divers times before and since, without the allowance or consent of the orators, or either of them, published, and exposed to sale, and sold, a book in two volumes, entitled "The Life of Washington in the form of an Autobiography, the narrative being to a great extent conducted by himself, in extracts and selections from his own writings, with portraits and other engravings," consisting of 866 pages, which they still continue to expose to sale, having had due notice, and well knowing, that the same is a copy from, and an infringement and piracy of, the said Life and Writings of George Washington so published by the Plaintiffs.

That 388 pages of the said piratical book are copied *verbatim et literatim* from the said work compiled by the said Sparks, consisting of matter published originally by the said Sparks, under his copyright, and which had never before been published or printed, and which the said Sparks had the exclusive right and privilege to print, publish, and sell.

And that many other parts of the piratical work are infringements of the said Sparks's said copyright, whereby the Plaintiffs have sustained great damage, and that the said Marsh, Capen and Lyon still threaten to continue to print, publish and sell, copies of the said piratical work.

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In consideration whereof, the Plaintiffs pray, that the Defendants be decreed to render an account of the copies of the said piratical work, which they have sold, and to pay over the profits thereof to the Plaintiffs ; to surrender and deliver up all the copies on hand, and the stereotype plates of the said work, to an officer of the Court, to be cancelled and destroyed ; to pay the Plaintiffs their costs, and that they be restrained by injunction from selling or exposing to sale, or causing to be exposed to sale or sold, or otherwise of disposing of any copies of the said piratical work, and for such other relief as shall seem meet, or as equity shall require.

The Answer stated as follows : That the Defendants, not confessing or acknowledging any of the matters and things alleged in the bill, are informed and believe, that the said complainants are the publishers of the said Life and Writings of Washington, as alleged by the complainants, and that the said Sparks is author thereof. But that they totally deny, that the said Sparks has, or has heretofore had, any copyright, whereby he is entitled to any exclusive publication of the said writings, correspondence, addresses, messages, and other papers. That the Defendants did, on August the 5th, 1840, publish and sell, and before and since have, without the allowance and consent of the Plaintiffs, published and sold copies of the said work in two volumes, entitled a Life of Washington, in the form of an Autobiography, but that the said work is not a copy from, nor a piracy of the said work, by the said Sparks. The Defendants deny, that any part of the said work, published by the Defendants, is copied *verbatim et literatim* from any portion of the said work by the said Sparks, to which he has any exclusive right and privilege to print, or publish, or sell. But they aver, that they have, in the work published by them, made such use as they might lawfully do, of the writings, correspondence, messages, addresses, and other papers, by George

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Washington, printed in the work compiled by the said Sparks, and that they have copied many pages of the said writings, from the original manuscript thereof, and from printed works, printed and published before the publication of the said work by the said Sparks, and that they have made such use thereof, as they might do in a work entirely distinct from and independent of the said work by the said Sparks, and they allege, that the said work published by them, is entirely a distinct and independent work from the work by the said Sparks.

The general replication being filed, the cause was referred to *George Hillard*, Esq., master in chancery, to ascertain and report the facts to the Court. His report in substance stated as follows :

The work, of which the plaintiffs are the proprietors, is comprised in twelve octavo volumes, varying in length from five hundred and forty to five hundred and ninety-two pages, and containing in the whole six thousand seven hundred and sixty-three pages, including one hundred and fifty-eight pages of index in the twelfth volume. The first volume consists of an original life of Washington by Mr. Sparks, one of the plaintiffs, and the remaining eleven, of the writings and correspondence of Washington, with editorial notes and illustrations by Mr. Sparks.

The work, of which the defendants are the proprietors, is in two volumes, duodecimo. The first volume consists of four hundred and forty-three pages, including forty-one pages of glossary and index. The second volume consists of four hundred and twenty-three pages, including thirty-five pages of glossary and index. The whole amount of the pages of the two volumes, is, therefore, eight hundred and sixty-six, including seventy-six pages of glossary and index.

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I find the whole number of pages in the two volumes of the defendants' work, which correspond with the passages in the plaintiffs' work, and are identical with them, to be (discarding fractions) three hundred and fifty three.

Of these pages, three hundred and nineteen have never appeared in print before the publication of the plaintiffs' work, and I accordingly report them to have been copied by the defendants from the work of the plaintiffs.

The remaining thirty-four pages have appeared before, in various other publications, with the variations hereinbefore stated. In view of these variations, and also in consideration of the fact, that these passages in the defendants' work, generally speaking, differ in punctuation and other typographical peculiarities from the same passages as contained in works, other than that of the plaintiffs, I find that these thirty-nine pages were taken by the defendants from the plaintiffs' work, and none other.

The whole of these three hundred and fifty-three pages, in the two volumes of the defendants' work, are taken from the last eleven volumes of the work of the plaintiffs.

Of the three hundred and nineteen pages, above-mentioned, which are in the work of the defendants, and which have not been published in any other work than that of the plaintiffs, I report sixty-four pages to be *official* letters and documents, and two hundred and fifty-five pages to be *private*.

Of the remaining thirty-four pages, I report fifteen pages to be *private*, and nineteen pages to be *official*.

Under the head of "*official*" letters and papers, I class the following :

Letters addressed by Washington, as commander-in-chief, to the President of Congress.

Official letters to governors of States and speakers of legislative bodies.

Circular letters.

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General orders.

Communications (official) addressed as President to his Cabinet.

Letter accepting the command of the army, on our expected war with France.

All others I class as "*private*."

The cause was argued upon the master's report, (no exception having been filed thereto), by *Robbins* and *Willard Phillips* for the plaintiffs, and by *R. Rantoul* for the defendants.

The points made by the defendants were as follows :

I. The papers of George Washington are not subjects of copyright.

1. They are manuscripts of a deceased person, not injured by publication of them.

2. They are not literary, and, therefore, are not literary property.

3. They are public in their nature, and, therefore, are not private property.

4. They were meant by the author for public use.

II. Mr. Sparks is not the owner of these papers, but they belong to the United States, and may be published by any one.

III. An author has a right to quote, select, extract or abridge from another, in the composition of a work essentially new.

STORY J. This is one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases. Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are,

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or at least may be, very subtle and refined, and, sometimes, almost evanescent. In many cases, indeed, what constitutes an infringement of a patented invention, is sufficiently clear and obvious, and stands upon broad and general agreements and differences; but, in other cases, the lines approach very near to each other, and, sometimes, become almost evanescent, or melt into each other. So, in cases of copyright, it is often exceedingly obvious, that the whole substance of one work has been copied from another, with slight omissions and formal differences only, which can be treated in no other way than as studied evasions; whereas, in other cases, the identity of the two works in substance, and the question of piracy, often depend upon a nice balance of the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials. Thus, for example, no one can doubt, that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy. A wide interval might, of course, exist between these two extremes, calling for great caution and involving great difficulty, where the Court is approaching the dividing middle line, which separates the one from the other. So, it has been decided, that a fair and *bonâ fide* abridgment of an original work, is not a piracy of the copyright of the author.¹ But,

¹ See *Dodsley v. Kinnersley*, (Ambler R. 403); *Whittingham v. Wooler* (2 Swanst. R. 428, 430, 431, note); *Tonson v. Walker* (3 Swanst. R. 672 to 679; Id. 681).

then, what constitutes a fair and *bonâ fide* abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can well arise for judicial discussion. It is clear, that a mere selection, or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work.¹

In the present case, the work alleged to be pirated, is the Writings of President Washington, in twelve volumes, royal octavo, containing nearly seven thousand pages, of which the first volume contains a life of Washington, by the learned editor, Mr. Sparks, in respect to which no piracy is asserted or proved. The other eleven volumes consist of the Letters of Washington, private and official, and his messages and other public acts, with explanatory notes and occasional illustrations by the editor. That the original work is of very great, and, I may almost say, of inestimable value, as the repository of the thoughts and opinions of that great man, no one pretends to doubt. The work of the defendants is in two volumes, duodecimo, containing eight hundred and sixty-six pages. It consists of a Life of Washington, written by the learned defendant, (the Rev. Charles W. Upham), which is formed upon a plan different from that of Mr. Sparks, and in which Washington is made mainly to tell the story of his own life, by inserting therein his letters and his messages, and other written documents, with such connecting lines in the narrative, as may illustrate and explain the times and circumstances, and occasions of writing them. Now, as I have already said, there is no complaint, that Mr. Upham has taken

¹ See *Tyler v. Wilcox* (2 Atk. 141).

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his narrative part, substantially, from the Life by Mr. Sparks. The *gravamen* is, that he has used the Letters of Washington, and inserted, *verbatim*, copies thereof from the collection of Mr. Sparks. The master finds, by his report, that the whole number of pages in Mr. Upham's work, corresponding and identical with the passages in Mr. Sparks's work, are three hundred and fifty-three pages out of eight hundred and sixty-six, a fraction more than one third of the two volumes of the defendants. Of these three hundred and fifty-three pages, the report finds, that three hundred and nineteen pages consist of Letters of Washington, which have been taken from Mr. Sparks's work, and have never been published before; namely, sixty-four pages are official letters and documents, and two hundred and fifty-five pages are private letters of Washington. The question, therefore, upon this admitted state of the facts, resolves itself into the point, whether such a use, in the defendants' work, of the letters of Washington, constitutes a piracy of the work of Mr. Sparks.

It is objected, in the first place, on behalf of the defendants, that the letters of Washington are not, in the sense of the law, proper subjects of copyright, for several reasons; (1), because they are the manuscripts of a deceased person, not injured by the publication thereof; (2), because they are not literary compositions, and, therefore, not susceptible of being literary property, nor esteemed of value by the author; (3), because they are, in their nature and character, either public or official letters, or private letters of business; and (4), because they were designed by the author for public use, and not for copyright, or private property.

Now, in relation to the last objection, it is most manifest, that President Washington deemed them his own private property, and bequeathed them to his nephew, the late Mr. Justice Washington, through whom the late Mr. Chief Justice Marshall and Mr. Sparks acquired an interest therein; and,

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as appears from the contract between these gentlemen, annexed to the report, the publication of these writings was undertaken by Mr. Sparks, as editor, for their joint benefit ; and the work itself has been accomplished at great expense and labor, and after great intellectual efforts, and very patient and comprehensive researches, both at home and abroad. The publication of the defendants, therefore, to some extent, must be injurious to the rights of property of the representatives and assignees of President Washington. Indeed, as we shall presently see, Congress have actually purchased these very letters and manuscripts, at a great price, for the benefit of the nation, from their owner and possessor under the will of Mr. Justice Washington, as private and most valuable property. That President Washington, therefore, intended them exclusively for public use, as a donation to the public, or did not esteem them of value as his own private property, appears to me to be a proposition, completely disproved by the evidence. Unless, indeed, there be a most unequivocal dedication of private letters and papers by the author, either to the public, or to some private person, I hold, that the author has a property therein, and that the copyright thereof exclusively belongs to him.

Then as to the supposed distinction between letters of business, or of a mere private or domestic character, and letters, which, from their character and contents, are to be treated as literary compositions, I am not prepared to admit its soundness or propriety. It is extremely difficult to say, what letters are or are not literary compositions. In one sense, all letters are literary, for they consist of the thoughts and language of the writer reduced to written characters, and show his style and his mode of constructing sentences, and his habits of composition. Many letters of business also embrace critical remarks and expressions of opinion on various subjects, moral, religious, political and literary. What is to

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be done in such cases? Even in compositions confessedly literary, the author may not intend, nay, often does not intend them for publication; and yet, no one on that account doubts his right of property therein, as a subject of value to himself and to his posterity. If subsequently published by his representatives, would they not have a copyright therein? It is highly probable, that neither Lord Chesterfield, nor Lord Orford, nor the poet Gray, nor Cowper, nor Lady Russell, nor Lady Montague, ever intended their letters for publication as literary compositions, although they abound with striking remarks, and elegant sketches, and sometimes with the most profound, as well as affecting, exhibitions of close reflection, and various knowledge and experience, mixed up with matters of business, personal anecdote, and family gossip.

There is no small confusion in the books, in reference to the question of copyright in letters. Some of the *dicta* seem to suppose, that no copyright can exist, except in letters, which are professedly literary; while others again, recognize a much more enlarged and liberal doctrine.¹ Without attempting to reconcile, or even to comment upon the language of the authorities on this head, I wish to state, what I conceive to be the true doctrine upon the whole subject. In the first place, I hold, that the author of any letter or letters, (and his representatives,) whether they are literary compositions, or familiar letters, or letters of business, possess the sole and exclusive copyright therein; and that no persons, neither those to whom they are addressed, nor other persons, have any right or authority, to publish the same upon their own account, or for their own benefit. But, consistently with this right, the persons, to whom they are addressed, may have, nay, must by implication

¹ See Godson on Patents and Copyright, p. 327 to 332, edit. 1840, London; *Gee v. Pritchard* (2 Swanst. R. 403, 405, 426, 427); *Perceval v. Phipps* (2 Ves. and Beam. 19, 24, 25, 28).

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possess, the right to publish any letter or letters addressed to them, upon such occasions, as require, or justify, the publication or public use of them ; but this right is strictly limited to such occasions.¹ Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper, to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach. If he attempt to publish such letter or letters on other occasions, not justifiable, a Court of Equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author ; and *a fortiori*, if he attempt to publish them for profit ; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer. In short, the person, to whom letters are addressed, has but a limited right, or special property, (if I may so call it), in such letters, as a trustee, or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character. The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright. *A fortiori*, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion. If the case of *Perceval v. Phipps* (2 Ves. and Beam. 21, 28) before the then Vice Chancellor, (Sir Thomas Plumer), contains a different doctrine, all I can

¹ *Gee v. Pritchard* (2 Swanst. R. 415, 419.

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say is, that I do not accede to its authority; and I fall back upon the more intelligible and reasonable doctrine of Lord Hardwicke, in *Pope v. Curl* (2 Atk. R. 342), and Lord Apsley, in the case of *Thompson v. Stanhope* (Amb. R. 737), and of Lord Keeper Henley, in the case of *The Duke of Queensbury v. Shelburne* (2 Eden, R. 329; 4 Burr. R. 2330), which Lord Eldon has not scrupled to hold to be binding authorities upon the point in *Gee v. Pritchard* (2 Swanst. R. 403, 414, 415, 419, 426, 427). But I do not understand, that Sir Thomas Plumer did, in *Perceval v. Phipps*, deny the right of property of the writer in his own letters; and so he was understood by Lord Eldon in *Gee v. Pritchard*; who, however, said, that that case admitted of much remark.

Indeed, if the doctrine were otherwise, that no person, or his representatives, could have a copyright in his own private or familiar letters, written to friends, upon interesting political and other occasions, or containing details of facts and occurrences, passing before the writer, it would operate as a great discouragement upon the collection and preservation thereof; and the materials of history would become far more scanty, than they otherwise would be. What descendant, or representative of the deceased author, would undertake to publish, at his own risk and expense, any such papers; and what editor would be willing to employ his own learning, and judgment, and researches, in illustrating such works, if, the moment they were successful, and possessed the substantial patronage of the public, a rival bookseller might republish them, either in the same, or in a cheaper form, and thus either share with him, or take from him the whole profits? It is the supposed exclusive copyright in such writings, which now encourages their publication thereof, from time to time, after the author has passed to the grave. To this we owe, not merely the publication of the writings of Washington, but of Franklin, and Jay, and Jefferson and Madison, and other distinguished

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statesmen of our own country. It appears to me, that the copyright act of 1831 (ch. 16, § 9) fully recognizes the doctrine for which I contend. It gives by implication to the author, or legal proprietor of any manuscript whatever, the sole right to print and publish the same, and expressly authorizes the Courts of Equity of the United States to grant injunctions to restrain the publication thereof, by any person or persons, without his consent.

In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. But this is an exception in favor of the government, and stands upon principles allied to, or nearly similar to, the rights of private individuals, to whom letters are addressed by their agents, to use them, and publish them, upon fit and justifiable occasions. But assuming the right of the government to publish such official letters and papers, under its own sanction, and for public purposes, I am not prepared to admit, that any private persons have a right to publish the same letters and papers, without the sanction of the government, for their own private profit and advantage. Recently the Duke of Wellington's despatches have (I believe) been published, by an able editor, with the consent of the noble Duke, and under the sanction of the government. It would be a strange thing to say, that a compilation involv-

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ing so much expense, and so much labor to the editor, in collecting and arranging the materials, might be pirated and republished by another bookseller, perhaps to the ruin of the original publisher, and editor. Before my mind arrives at such a conclusion, I must have clear and positive lights to guide my judgment, or to bind me in point of authority. However, it is not necessary, in this case, to dispose of this point, because, of the letters and documents, published by the defendants, not more than one fifth part are of an official character.

Another and distinct objection, urged on behalf of the defendants, is, that Congress have purchased the manuscripts of these letters and documents, and they have become public property, and may be published by any one. An answer, in part, has been already given to this objection. Congress have, indeed, authorized the purchase of these manuscripts from the owner and possessor thereof, and paid the liberal price of 25,000 dollars therefor; and they have thus become national property. But it is an entirely inadmissible conclusion, that, therefore, every private person has a right to use them, and publish them. It might be contended, with as much force and correctness, that every private person had an equal right to use any other national property at his pleasure, such as the arms, the ammunition, the ships, or the custom houses, belonging to the government. But a reason, which is entirely conclusive upon this point, is, that the government purchased the manuscripts, subject to the copyright already acquired by the plaintiffs in the publication thereof. The vendor took them subject to that copyright, and could convey no title, which he did not himself possess, or beyond what he possessed. Nor is there any pretence to say that he either did convey, or intended to convey, to the government, the property in these manuscripts, except subject to the copyright already acquired.

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The next and leading objection is, that the defendants had a right to abridge and select, and use the materials which they have taken for their work, which, though it embraces the number of letters above stated, is an original and new work, and that it constitutes, in no just sense, a piracy of the work of the plaintiffs. This, in truth, is the real hinge of the whole controversy, and involves the entire merits of the suit. It is certainly true, that the defendants' work cannot properly be treated as an abridgment of that of the plaintiffs; neither is it strictly and wholly a mere compilation from the latter. So far as the narrative goes, it is either original, or derived (at least as far as the matter has been brought before the Court) from common sources of information, open to all authors. It is not even of the nature of a collection of beauties of an author; for it does not profess to give fugitive extracts, or brilliant passages from particular letters. It is a selection of the entire contents of particular letters, from the whole collection or mass of letters of the work of the plaintiffs. From the known taste and ability of Mr. Upham, it cannot be doubted, that these letters are the most instructive, useful and interesting to be found in that large collection.

The question, then, is, whether this is a justifiable use of the original materials, such as the law recognizes as no infringement of the copyright of the Plaintiffs. It is said, that the Defendant has selected only such materials, as suited his own limited purpose as a biographer. That is, doubtless, true; and he has produced an exceedingly valuable book. But that is no answer to the difficulty. It is certainly not necessary, to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to

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constitute a piracy *pro tanto*. The entirety of the copyright is the property of the author ; and it is no defence, that another person has appropriated a part, and not the whole, of any property. Neither does it necessarily depend upon the quantity taken, whether it is an infringement of the copyright, or not. It is often affected by other considerations, the value of the materials taken, and the importance of it to the sale of the original work. Lord Cottenham, in the recent cases of *Bromhall v. Halcombe* (3 Mylne and Craig. 737, 738), and *Saunders v. Smith* (3 Mylne and Craig. R. 711, 736, 737), adverting to this point, said : " When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, that is always looked to. It is useless to refer to any particular cases, as to quantity." In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases, a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and cannot fairly be treated as a piracy ; or they may be inserted as a sort of distinct and mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy. If a person should, under color of publishing "Elegant Extracts" of poetry, include all the best pieces at large of a favorite poet, whose volume was secured by a copyright, it would be difficult to say, why it was not an invasion of that right, since it might

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constitute the entire value of the volume. The case of *Man-~~man~~ v. Tegg* (2 Russell R. 383), is to this purpose. There was no pretence in that case, that all the articles of the Encyclopedia of the Plaintiffs had been copied into that of the Defendants; but large portions of the materials of the Plaintiffs' work had been copied. Lord Eldon, upon that occasion, held, that there might be a piracy of part of a work, which would entitle the Plaintiffs to a full remedy and relief in Equity. In prior cases, he had affirmed the like doctrine. In *Wilkins v. Aikin* (17 Ves. 422, 424), he said, "There is no doubt, that a man cannot, under the pretence of quotation, publish either the whole or a part of another's book, though he may use, what in all cases it is difficult to define, fair quotation." In *Roworth v. Wilkes* (1 Camp. R. 94), Lord Ellenborough said, "A review will not, in general, serve as a substitute for the book reviewed; and even there, if so much is extracted, that it communicates the same knowledge with the original work, it is an actionable violation of literary property. The intention to pirate is not necessary in an action of this sort; it is enough, that the publication complained of is in substance a copy, whereby a work vested in another is prejudiced. A compilation of this kind (an Encyclopedia) may differ from a Treatise published by itself; but there must be certain limits fixed to its transcripts; it must not be allowed to sweep up all modern works, or an Encyclopedia would be a recipe for completely breaking down literary property." The Vice Chancellor (Sir L. Shadwell), in *Sweet v. Shaw* (The Jurist [London] vol. i. p. 212), referring to the remarks of Lord Ellenborough, cited by counsel, said: "That does not mean a substitute for the whole work. From what you state, suppose a book to contain one hundred articles, and ninety-nine were taken, still it would not be a substitute." And in this very case he granted an injunction, being of opinion, that there was *primâ facie*, at law, an invasion of the Plaintiffs' right; not only an injury, but also a

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damage to the Plaintiffs, in copying from several volumes of Reports, published by the Plaintiffs, although eleven only had been copied *verbatim*, but a considerable number of what were called abridged cases, were, in truth, copies of the Plaintiffs' volumes, with little, or trifling, alterations. It is manifest, also, from what fell from Lord Chancellor Cottenham, in *Saunders v. Smith* (3 Mylne & Craig. 711), that he entertained no doubt, (although he did not decide the point) that there might be a violation of the copyright of volumes of Reports, by copying *verbatim* a part only of the cases reported. Much must, in such cases, depend upon the nature of the new work, the value and extent of the copies, and the degree in which the original authors may be injured thereby. In *Lewis v. Fullarton* (The Jurist, [English] vol. ii. p. 127; S. C. 2 Beavan's R. 6), Lord Langdale, in the case of a Topographical Dictionary, held, that largely copying from the work, in another book, having a similar object, was a violation of that copyright, although the same information might have been (but, in fact, was not) obtained from common sources, open to all persons. On that occasion, he said, "None are entitled to save themselves trouble and expense, by availing themselves, for their own profit, of other men's works, still entitled to the protection of copyright;" and, accordingly, in that case, he granted an injunction as to the parts pirated, although it was admitted, on all hands, that there was much, which was original, in the new work.

In the present case, I have no doubt whatever, that there is an invasion of the Plaintiffs' copyright; I do not say designedly, or from bad intentions; on the contrary, I entertain no doubt, that it was deemed a perfectly lawful and justifiable use of the Plaintiffs' work. But if the Defendants may take three hundred and nineteen letters, included in the Plaintiffs' copyright, and exclusively belonging to them, there is no reason why another bookseller may not take other five hundred letters, and a third, one thousand letters, and so on, and

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thereby the Plaintiffs' copyright be totally destroyed. Besides; every one must see, that the work of the Defendants is mainly founded upon these letters, constituting more than one third of their work, and imparting to it its greatest, nay, its essential value. Without those letters, in its present form the work must fall to the ground. It is not a case, where abbreviated or select passages are taken from particular letters; but the entire letters are taken, and those of most interest and value to the public, as illustrating the life, the acts, and the character of Washington. It seems to me, therefore, that it is a clear invasion of the right of property of the Plaintiffs, if the copying of parts of a work, not constituting a major part, can ever be a violation thereof; as upon principle and authority, I have no doubt it may be. If it had been the case of a fair and *bona fide* abridgment of the work of the Plaintiffs, it might have admitted of a very different consideration.

I have come to this conclusion, not without some regret, that it may interfere, in some measure, with the very meritorious labors of the Defendants, in their great undertaking of a series of works adapted to School Libraries. But a Judge is entitled in this case, as in others, only to know and to act upon his duty. I hope, however, that some means may be found, to produce an amicable settlement of this unhappy controversy.

The report of the Master must stand confirmed, and a perpetual injunction be awarded, restraining the Defendants, their agents, servants and salesmen, from farther printing, publishing, selling, or disposing of any copy or copies of the work complained of; the "Life of Washington," by the Rev. Charles W. Upham, containing any of the three hundred and nineteen letters of Washington, stated in the Report of the Master, and never before published; and that it be referred to a Master, to take an account of the profits made by the Defendants, in the premises; with leave for either party to apply to the Court for farther directions.

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THE authority of the officers in a merchant-ship, to compel obedience and inflict punishment, is of a summary character, but is not of a military character.

The right of the mate or other officers of a ship to inflict punishment on the seamen, when the master is on board and at hand, can be justified only by the immediate exigencies of the sea service, or as a necessary means to suppress mutinous, illegal, or flagrant misbehavior on the part of the seamen, or to compel obedience on the part of the seamen to orders, or other duties, which require prompt and instant action and interference on the part of the officers, and admit of no delay. In general, it is the duty of the officers to consult the master as to the infliction of punishment.

If the master of a vessel set sail on a voyage, with a crew in such a state of intoxication, as disables them at the time for the proper performance of the ship's duty, and any disaster arise therefrom; *it seems*, that any loss from that disaster would not be recoverable from the underwriters, under the common form of policies of insurance.

THIS was an indictment against Hunt, founded upon the Crimes Act of 3d of March, 1825, ch. 276, § 22, for assaulting with a dangerous weapon (*viz.* a cutlass) one Thomas Coombs, on board of the American brig called *The Havre*, within the waters of Massachusetts Bay, and the admiralty and maritime jurisdiction of the United States. Plea, not guilty.

At the trial the facts appeared to be as follows. The defendant (Hunt) was mate of the ship, and Coombs was a seaman on board. On the 19th of October, 1841, the brig sailed from the inner harbor of Boston bound on a voyage to Savannah.

It appeared, that the vessel sailed from the wharf at Boston in the afternoon, and was standing out to sea, having reached Nantasket Roads, when it became necessary to secure the anchors, and to heave to, for the purpose of discharging the pilot. Three or four of the crew had been intoxicated ever

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since they came on board, and had caused the pilot and officers a good deal of trouble ; sometimes remaining below and refusing to come on deck. After reaching the Roads, the Captain (Carpenter) gave orders to heave the brig to, and asked Hunt, where the rest of the men were. Hunt answered, that he had called them several times and they had refused. (One of the crew testified, that Hunt had called these men up and received very insolent answers.) The captain then called them up, and they answered, that "they'd be d—d if they would come until they were a-mind to." The captain then said, "I'll come down to you, then." The men answered, "Come down ;" and upon Capt. C.'s stepping down a few steps, they held out their hands towards him, (as he testified,) in a threatening manner. He then went aft, but one of the men, Coombs, came up and followed him to his windlass end, and struck at him with his fist. The blow was spent, but reached the captain's breast. Capt. C. took up a handspike, but Coombs got it away from him. At this moment Hunt seized Coombs, but received from him a blow in the face, which gave him a black eye. Hunt then ran aft to the round-house, and came forward with his cutlass drawn, and the scabbard left behind. As he went forward, the pilot told him to be careful, how he used his cutlass.

Up to this point there was no discrepancy in the testimony. It appeared, also, that it was rather squally, and there was a hail squall soon after the vessel came to anchor.

Hunt then went forward and struck Coombs two or three blows with the *flat* of his cutlass (as all the witnesses agreed) over the head and shoulders. The captain, second mate and cabin-boy here testified, that after these blows the mate retreated, and Coombs followed him, striking at him with his fists and daring him ; that they saw no blows given with particular force by the mate, but that Coombs seemed to be wounded in the *melee* and confusion of the mate's defence,

and attempt to reduce him to obedience. The same witnesses testified, that the *melee* ended several feet further aft than it began. The rest of the crew testified, that after two or three blows with the flat of the cutlass, Hunt seized the weapon and brought it down several times, with great force, upon the sharp edge, upon the hands and wrists of Coombs, who was only attempting to defend himself.

According to the evidence of the crew, Coombs stood between the windlass end and the bow of the long-boat, when Hunt first struck him, and was in the same, or nearly the same place, when the affair ended.

The pilot did not see the fight, being on the other side of the boat. Some of the rest of the crew interfered, though it appeared, that one of them took hold of Hunt just as he was first attacking Coombs, before he got his cutlass, but, as was admitted, with no hostile intention.

Doctors Ayres and Otis testified, that the left wrist of Coombs was nearly cut off, the right hand and arm badly wounded, and that amputation of the left might be necessary, though there were hopes of saving it. The other facts in the case sufficiently appear in the charge of the judge.

R. H. Dana, jr., for the prisoner, rested the defence upon the following grounds: The repeated and deliberate acts of disobedience, accompanied with insolent language, and finally with an attack upon the captain, constituted, or might have appeared to Hunt to constitute, a mutiny. The taking forcibly from the captain a weapon of defence, which he had seized, and the attack upon Hunt, when he came to the captain's aid, aggravated the case; and another of the crew taking hold of Hunt at the moment, from whatever motive, might, in the excitement, have reasonably given the prisoner a fear of a general mutiny. His striking with the flat of the cutlass several times, showed the moderation of his proceedings, and the fact, that Coombs met him unarmed, and neither retreated

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nor sought a weapon of defence would seem to be evidence of no violence on the part of Hunt. It should be remembered, too, that Coombs did not even retire to the fore-castle, the proper place for a seaman. Although there should turn out to have been no mutiny in fact, yet if the state of things was such as, under the circumstances, might reasonably have led the prisoner to suppose, that there was a mutiny, he must be excused for acting under that supposition, if his acts were moderate and reasonable for a person honestly so supposing. In mutiny, revolt, &c. the maritime law permits, and if necessary, enjoins, the use of dangerous weapons. The master and officers must be their own protectors, and the protectors of the lives and property under their charge. If the prisoner came lawfully in possession of the dangerous weapon and then used it in a moderate, or, under the circumstances, excusable manner, he must be acquitted.

Franklin Dexter, district attorney admitted the right of an officer to use dangerous weapons, in cases of necessity; but here was no mutiny; no one interfered in behalf of Coombs; and Coombs was known to be drunk. There were the master, pilot, and the mates to manage him, and the vessel had not left the harbor, but might have come to, and sent up to town or made a signal for aid. There was no necessity for using the cutlass. Hunt asked for no aid from any one, and no one offered to help him, showing that there could have been no serious danger. Coombs was alone, unarmed and unsupported by any one. The pilot cautioned Hunt as to his cutlass. The wounds, as testified to by the surgeons, could not have been received by Coombs striking at Hunt. They must have been given by a downward and a strong blow. There is no sufficient justification for using a dangerous weapon, and inflicting therewith a severe and maiming wound. He must be found guilty of the offence.

STORY J. In summing up the case to the jury, among other things said; There is no doubt in this case, that the defendant, (the mate), committed an assault with a dangerous weapon, (a cutlass), upon Coombs, (the seaman), in the manner stated in the indictment; and, that the place where the offence was committed was within the admiralty and maritime jurisdiction of the United States, on board of the brig Havre, owned by citizens of the United States. The wounds inflicted by Hunt upon Coombs were exceedingly severe, and it will not be surprising, if it shall turn out, according to the suggestion made by Dr. Otis, that amputation of the right hand should become necessary, although he yet hopes, that it may not be required. Under such circumstances, the offence is clearly established, unless the infliction of these wounds with the cutlass was justified on account of some positive necessity really then existing, or on account of some supposed necessity, then honestly and reasonably believed to exist by the defendant, either justifiable or excusable in point of law. If there was no such necessity, then the act was unlawful, and the defendant ought to be found guilty. So, if there was any such real or supposed necessity, and yet the punishment was excessive, either in kind or degree, the same result ought to follow. It will be important, therefore, for the jury to examine the whole circumstances of the case with scrupulous diligence and care. And here I may say, that where facts, sufficient to constitute the offence are established *prima facie* by the evidence, the burthen of proof is upon the defendant himself to show, that such a real or supposed necessity existed, which either justified or excused the acts, unless so far, indeed, as the attendant circumstances in the evidence offered by the government, do, of themselves, go to establish such a legal justification or excuse. If the defendant fails to satisfy the jury, that there was, in point of fact, any such legal justification or excuse from such a real or supposed necessity, or he

leaves it in doubt, then their verdict ought to be for the government.

It is apparent from the evidence, that the crew were, at the time when this affray occurred, in a state of intoxication, from the use of spirituous liquors. Under such circumstances, they could scarcely be said to be fit for the due performance of the ship's duty, and were in a state, which might readily lead to disobedience of orders, and even to a mutiny and revolt. The path of prudence, therefore, clearly was, on the part of the master and officers, to avoid, as much as possible, all undue causes of excitement. This seems to have been the notion of the master himself. Indeed it might, perhaps, have been well for the master to have remained in Nantasket Road, until the crew were, in a great measure, recovered from their intoxication, before he sailed on the voyage. And, I desire to say, that it may be a matter of great doubt, whether, if the master set sail on a voyage with a crew in such a state of intoxication as disables them, at the time, from the proper performance of the ship's duty, and any disaster arise therefrom, any loss from that disaster would be recoverable from the underwriters under our common policies of insurance. The ship, under such circumstances, could scarcely be deemed, in the sense of the law, seaworthy for the voyage.

In respect to the right of the mate and other officers of the ship to inflict punishment on the seamen, when the master is on board, and at hand, it can be justified only by the immediate exigencies of the sea service, or as a necessary means to suppress mutinous, illegal or flagrant misbehavior on the part of the seamen, or to compel obedience to orders or other duties, which require prompt and instant action and interference on the part of the officers, and admit of no delay. If the circumstances are not urgent and imperative, it is the duty of the mate and other officers to consult the master as to the infliction of punishment ; for he, being in the command of the

ship, is alone ordinarily entrusted with the regulation of the ship's discipline; and no other person has any right to inflict punishment without his express or implied sanction thereof. Cases indeed, may, and do often arise, where instant obedience to the orders of the mate is necessary; such as orders to take in sail in a sudden squall, or to cut away the rigging or spars, or to go aloft on a sudden and emergent duty, where the mate may instantly enforce obedience, by the application of positive force, and indeed of all the force required to produce prompt obedience. But, then, every such case is justifiable only from necessity, and the force so used is not so much a punishment, as it is a means of compelling the performance of a pressing duty, admitting of no delay. One question, therefore, in the present case, is, whether any such necessity did exist, which either justified or required so harsh and severe a punishment. I must confess, that I have great difficulty in saying, that it is clearly made out by the evidence, and unless it is, the verdict of the jury ought to be against the defendant.

It is certainly true in this case, that the conduct of Coombs (the seaman) was of a grossly mutinous and improper character. The master, in his testimony, states, that when Coombs followed him on deck, he (the master) seized a handspike, not, (as he asserts,) with intent to strike Coombs, but to intimidate him. Coombs immediately struck him, (the master,) which was a most unjustifiable act, unless done in necessary self-defence, in order to repel an attack meditated by the master with the handspike, a weapon of great and dangerous power. The master says, that he did not return the blow, but put down the handspike; and immediately the defendant (the mate) came and took hold of Coombs. Coombs then struck the defendant, and gave him a black eye; upon which the defendant became greatly excited; and said; "I am not here to be pounded; give me my cutlass:" and immediately

went into a house on the deck, at about thirty or forty feet distance, and got his cutlass, and came back and struck Coombs two or three blows with the back of the cutlass. Coombs was at that time holding up his hands, and making passes at the mate. After this the mate and Coombs closed. The master did not see the blows struck by the mate with the edge of the cutlass; nor did he see Coombs take hold of the mate. Such is the substance of the master's testimony upon this point. He does not pretend, that he was under any immediate fear of other blows being struck upon himself by Coombs; nor did he in any manner authorize or require the interference of the mate in his defence. But that interference was a sudden impulse and voluntary act of the mate, without any call for his aid.

From the other evidence in the case, it is abundantly clear, that the blows inflicted by the mate upon Coombs, with the edge of the cutlass, were (as has been already suggested) exceedingly severe, and violent. Coombs's right hand was (as the physicians state) half cut off, the edge of the cutlass having cut directly through the bones of the wrist, and divided the joint to the external muscles. Both of the arteries were cut off; and the wound bled profusely. The fleshy part of the left hand also had a deep gash cut across it; and the left thumb also was severely cut. There were, then, three large wounds; and it is as yet uncertain, whether an amputation of the right hand may not become necessary. The physicians also testify, that the wounds could not, in their judgment, have occurred by an attempt merely to ward off blows.

There is a great deal of other testimony in the case by several of the crew, to establish, that Coombs did not attempt to strike the mate after he got the cutlass; but merely to defend himself; that he put up his hands to ward off the blows of the mate; and that the mate struck Coombs three

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times with the edge of the cutlass. On the other side, the second mate testifies, that Coombs struck the captain more than one blow, and that when the mate came with his cutlass, Coombs ran towards him, and the latter retreated five or six feet; that a scuffle then ensued; that he (the second mate) saw none of the blows struck with the cutlass; but he saw Coombs immediately afterwards bleeding. As soon as the affray was over, the defendant (the mate) helped to bind up the wounds of Coombs. The character of the defendant, for general humanity and moderation, is also testified to in a favorable manner.

It is certainly difficult to reconcile the testimony of the second mate with that of the master. But the latter stands strongly confirmed by the testimony of the rest of the crew, as well as by that of the pilot, as far as he saw the transactions, and has spoken to the facts. It will be for the jury, however, to judge of the credibility of the witnesses, and to compare and weigh their testimony.

But, under all the circumstances, it appears to me, that the burthen of proof is upon the defendant, to establish by clear and determinate evidence, that the wounds thus inflicted upon Coombs (of the nature and full extent of which there is no controversy), were inflicted by the mate in justifiable self-defence, or on an occasion of some real, or supposed urgent necessity, admitting of no delay, and indispensable to the ship's service, such as I have already adverted to. Has such a case been made out? If it has not been made out, beyond any reasonable doubt, then the defendant ought to be pronounced guilty of the charge in the indictment. If it has been, then he ought to be acquitted. It will not be sufficient, for the defendant, to prove, that he had a strong cause of provocation, or that Coombs was acting in an unjustifiable manner, or was guilty of gross misconduct. He must go farther, and show, that the acts done by himself were, absolutely or appa-

rently, required by the pressing exigencies of the occasion, and that in their character and degree, there was no excess beyond these exigencies. Seamen are not to be treated like brutes, simply because they misbehave themselves ; neither has any officer of a ship a right to indulge his own passions or resentments, by inflicting upon them cruel, or harsh, or vindictive punishments. If he does, he is amenable to the justice of his country for his misconduct. Undoubtedly, the mate upon this occasion, acted under strong excitements. But he was bound by his duty, to circumspection and moderation ; and, indeed, he had no right (as has been already intimated), while the master was present, to inflict any punishment upon the crew without his consent, unless there was some imperious necessity, which required instant action, and justified the use of the cutlass to the full extent and degree, in which it was used.

The learned counsel for the defendant has asked the Court to direct the jury, that the officers of the ship are clothed, not merely with a civil, but with a military power, over the seamen on board. In my judgment, that is not the true relation of the parties. The authority to compel obedience, and to inflict punishment, is, indeed, of a summary character, but, in no just sense, of a military character. It is entirely civil ; and far more resembles the authority of a parent over his children, or rather, that of a master over his servant or apprentice, than that of a commander over his soldiers. Properly speaking, however, the authority of the officers, over the seamen of a ship, is of a peculiar character, and drawn from the usages, and customs, and necessities of the maritime naval service, and founded upon principles applicable to that relation, which is full of difficulties and perils, and requires extraordinary restraints, and extraordinary discipline, and extraordinary promptitude and obedience to orders.

It has been also suggested, that the crew were in a state

of mutiny; and that the immediate interference of the mate was necessary, to suppress it. But that does not seem to be made out by the evidence; for there is no proof, of any general disobedience by all the crew, or of any general combination and coöperation with each other, to resist orders, or indeed, of any thing but of mere tardiness and reluctance to go to work, probably in some measure superinduced by intoxication. Nor am I able to perceive in the evidence, if believed, any distinct proofs, that the wounds were accidental, or unintentional. On the contrary, all the witnesses, who speak directly to the point of the manner and circumstances, under which the wounds were inflicted, treat them as voluntary acts, and as not accidental, or required in self-defence, or from any real, or apparent necessity. However, this is a matter of fact, upon which the jury will exercise their own sound judgments, in deciding upon the credibility of the evidence, and the conclusion, to which it ought to lead them.

Verdict for the defendant, not guilty.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, APRIL TERM, 1842, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. PELEG SPRAGUE, District Judge.

EX PARTE JOHN S. FOSTER.¹

By the Bankrupt Law of 1841, the District Courts of the United States are possessed of the full jurisdiction of Courts of Equity over all subject-matters arising in Bankruptcy.

By the common law, liens exist only in cases, where the party, entitled thereto, has either actual or constructive possession of the goods; but in the maritime law, and in Equity, they exist independently of possession.

A lien in Equity is not a property in the thing; nor does it constitute a right of action for the thing; but is a charge upon the thing.

An attachment on *mesne process* does not exactly correspond to a lien, either in the sense of the common law, or of the maritime law, or of Equity. It is only a contingent and conditional charge, until the judgment and levy.

A foreign attachment, like an attachment on *mesne process*, is a remedy, and, like every remedy, may be defeated by any act, that bars, or takes away the remedy or right to judgment under it.

Where the property of a bankrupt is attached on *mesne process*, before proceedings in bankruptcy are instituted, if he obtain a discharge before any judgment is rendered in such suit, it is pleadable as a bar to that very suit, and will prevent the attaching creditor from completing his attachment by a judgment.

By a decree of bankruptcy, all the property and rights of property of the

¹ See *Ex Parte Abree*, 3 Ves. R. 82, 83.

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bankrupt are divested from him, and vest in the assignee as soon as one is appointed; and such decree relates back to the time of the petition; consequently, pending the proceedings in bankruptcy, before or after the decree, an attaching creditor will not be permitted to proceed in his suit against the bankrupt to trial and judgment, because there can be no party defendant properly before the Court.

If an attaching creditor, knowing that proceedings in bankruptcy have been instituted, should nevertheless proceed in his suit to get a judgment against the bankrupt, before an assignee was appointed, it would be a fraud upon the law; and if such creditor should obtain satisfaction of his judgment, it *seems*, that he would not be allowed to hold the money.

While the bankrupt proceedings are in progress, no attaching creditor, by a mere race of diligence, will be permitted to overreach and defeat the just rights of the other creditors, or the right of the bankrupt, if entitled to a discharge, to plead the same in bar of a judgment in such suit. In such a case, the Court will enjoin a creditor from proceeding further in his suit than is necessary to protect his ulterior rights, and will allow the writ and proceedings of the attaching creditor to be entered in the proper Court, and to be continued, if the creditor elect so to do, until the discharge of the bankrupt is obtained; but not to proceed in the mean time to trial or judgment.

Where A. by a writ of attachment from the State Court, attached the goods of B.; and soon afterwards B. petitioned for the benefit of the Bankrupt Act; and then, fearing that A. might proceed to get judgment before he could be declared a bankrupt and obtain a certificate of discharge, and levy his execution upon the goods attached, B. applied to the District Court for an order to stay further proceedings by A. in the suit, and for other relief; *It was held*, that the District Court had authority to control the proceedings of A. in the suit; and that A. might be permitted to enter his action and continue it; but he had no right, during the proceedings in bankruptcy, to proceed to a trial and judgment in the suit.

Whether, if the bankrupt fail to obtain his discharge, the attachment would be gone by the mere operation of the Bankrupt Act; or whether a judgment *in personam* may be rendered against him, *quære*.

Where a suit has been commenced *bond fide*, and the defendant becomes a bankrupt, the actual costs are to be paid out of the estate, but no subsequent costs.

THIS was the case of a petition filed by John S. Foster, in bankruptcy, in the District Court. The petition was, in substance, as follows:

To the honorable the district Judge of the district aforesaid John S. Foster respectfully represents, that on the twenty-fifth

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day of the present month of March, he filed a petition in this honorable Court to be declared a bankrupt, pursuant to the provisions of the statute of the United States in that behalf made and provided.

And your petitioner further represents, that William Appleton, one of the creditors mentioned in the schedule marked A, annexed to his said petition, did, upon the fourth day of March aforesaid, sue out a trustee writ against your petitioner, from the Court of Common Pleas for the county of Suffolk and Commonwealth of Massachusetts, returnable to the next ensuing April term of said Court; and did cause to be attached thereon certain of the goods and merchandise belonging to your petitioner, being a portion of his stock in trade mentioned in his schedule marked B, annexed to his said petition; and your petitioner further states, that one Coburn, the deputy of the sheriff of the county aforesaid, to whom said writ was directed for service thereof, did, after notice that your petitioner was about to file his said petition to be declared a bankrupt, remove from the store of your petitioner, divers goods and merchandise of the value of about seven hundred dollars, and still holds and detains the same in his possession. And your petitioner further represents that certain other persons doing business respectively under the names of Davis, Bates and Turner, and Stephen Brownell, likewise creditors of your petitioner, mentioned in said schedule marked A, did, within the said month of March, and prior to the filing of said petition, sue out certain trustee writs against your petitioner from said Court of Common Pleas, returnable at the April term thereof aforesaid, and that they and also said Appleton did cause the Boston Mutual Fire Insurance Company, a corporation doing business in said Boston, and a debtor of your petitioner, to be summoned as a trustee of your petitioner, and the debt due from said corporation to your petitioner to be attached upon said writs respectively. And your petitioner

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further states, that he is apprehensive that said creditors may obtain judgments in said several suits at an early date of the term aforesaid: and that they may procure executions to be issued thereon, and satisfied out of the property attached as aforesaid, and their several demands on your petitioner to be paid in full, and thereby greatly diminish and reduce the assets of your petitioner, and obtain an undue proportion thereof, to the great injury of the other creditors of your petitioner, and in direct violation of the spirit and true intent of the statute aforesaid, or expose the assignee of your petitioner to great risk and trouble in the recovery of the property attached as aforesaid. Wherefore your petitioner respectfully prays this honorable Court, that an order of notice may issue on said petition, &c., and that an injunction may be granted against said attaching creditors, enjoining them from further proceeding against said property of your petitioner, and requiring them to surrender the same to such assignee as may be appointed by this honorable Court in the premises: and that such other orders may be issued, and relief granted, as to this honorable Court shall seem meet.

The Answer of John G. Davis, Benjamin E. Bates, and John N. Turner admitted that on the fourth day of March, current, they had sued out a writ against said Foster, and one Locke, his former partner, upon a joint debt due from said Foster and Locke, returnable to the Court of Common Pleas to be held at Boston on the first Tuesday of April next; upon which writ they caused the Boston Mutual Fire Insurance Company, a corporation, to be summoned as trustees of said defendants, or one of them, and certain goods, effects or credits of said defendants, then in the hands of said corporation, to be attached. That said attachment was made, and the service of said writ completed, long before said Foster filed his petition in this Court to be declared a bankrupt, and without notice

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to them that he contemplated such an act. And they claimed to hold the goods, effects or credits, so attached, as security for such judgment as they might recover in said writ, as a lien thereon, valid by the laws of Massachusetts. And these respondents further represented that they had incurred expenses and costs in and about said suit, which they prayed the Court to consider in any decree which might be made in the premises. Wherefore they prayed that the petition of said Foster might be denied.

The Answer of William Appleton was as follows :

And now William Appleton, who has been summoned in the said matter to show cause why he should not be enjoined from further proceedings against the property of said Foster, attached by him, as set forth in said Foster's petition, comes and represents to this honorable Court, that he did, on or about the fourth day of March, current, sue out a writ from the Court of Common Pleas for the county of Suffolk, against said Foster, returnable into the next April term of said Court, upon a demand legally and justly due him from said Foster ; and that on said fourth day of March one Daniel J. Coburn, then and ever since a deputy of the sheriff of said county, did, by virtue of said writ, attach thereon certain personal property of said Foster then in the store occupied by him. That said Coburn preserved said attachment on said goods by a keeper placed in said store, according to the laws and usages of this Commonwealth, until the twenty-third day of said March, when, to avoid further expense of a keeper, the said Coburn removed said goods from said store into a place of safety, where he still hath them in custody under and by virtue of said attachment so made as aforesaid on the fourth day of said March, and long before the filing of said Foster's petition to be declared a bankrupt. And said Appleton doth not admit that any notice of an intention on the part of said Foster to

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file a petition to be declared a bankrupt was given to said Coburn, as set forth in said Foster's petition, and require said Foster to prove that fact, if it be deemed material. And said Appleton further represents, that he has expended large sums of money in making and preserving said attachment, and keeping said property, and that said demand is still due him from said Foster. Wherefore said Appleton prays that said Foster's petition for said injunction against him the said Appleton, and for the surrender of said attached property, be dismissed for his costs. But if said Court shall be of opinion that said injunction shall issue and said attached goods be surrendered as prayed for, then said Appleton requests that such orders be passed only on condition that said Appleton be first paid the sums expended by him in making said attachment, and in the keeping and preservation of said property.

The case came before the District Court on the petition and answers, and the district judge ordered the following questions to be certified to the Circuit Court:

1. Whether, upon the facts stated in said petition, and admitted by the answer of William Appleton, one of said attaching creditors, the injunction prayed for, enjoining the attaching creditors from further proceeding against the property of the petitioner, and requiring it to be surrendered to such assignee as may be appointed by the Court, shall be granted?

2. Whether any, and if any, what relief shall be granted to the petitioner?

The case was argued by *C. G. Loring* and *Dehon* for the petitioner, and by *J. L. English* and *E. D. Sohler, Jr.* for the attaching creditors of Foster. And the same question, being for argument upon other petitions, was argued by *Rand* for the attaching creditors. The case of another petitioner was argued by *Goodrich*.

English, for the attaching creditors, argued as follows: It is admitted, that the doctrine contended for by the petitioner

is in accordance with the general principles of equity, and if established, would effect a more equal distribution of the property than our construction of the law would do.

But the question is upon the true construction of the last clause of the second section of the bankrupt law, and the language seems to be quite explicit.

It is clear, that Congress meant to preserve and uphold *certain* securities existing on the property of the bankrupt at the time of his bankruptcy; and it is equally clear, that they did not mean such securities only as are valid every where, but had reference to the special legislation and local law of the respective States.

It is submitted, that the property attached in the present case passes to the assignee, subject to, and not discharged from, the attachment, because,

1st. An attachment does constitute a lien or other security upon the property attached, which is valid by the law of Massachusetts.

This seems clear both from the language and object of the statutes on the subject, as well as from the established doctrine and express decision of the courts. Rev. Stat. ch. 90, sect. 23 and 24; *Ladd v. North* (2 Mass. R. 514); *Grosvenor v. Gold* (9 Mass. R. 209); *Bigelow v. Willson* (1 Pick. 492); *Denny v. Willard* (11 Pick. 524); *Smith v. Bradstreet* (16 Pick. 264).

In *Smith v. Bradstreet* the Court say in so many words, "*An attachment constitutes a lien, a real interest in the land, which may be followed up to a perfect title.*"

2d. The upholding such a security would not be inconsistent with the provisions of the second and fifth sections of the bankrupt law, whether taken by themselves, or construed by the other parts of the act.

This attachment was made *bona fide*, before petition filed, and without notice of any contemplation of bankruptcy. It

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does not come within the class of fraudulent preferences declared void by the second section.

The equal distribution provided for in the fifth section, does not extend to *all* the creditors, but only to such as prove their debts. It is left optional with the creditor to prove or not. *If* he proves, he thereby disables himself to prosecute further any suit then in progress, and all his proceedings are deemed to be voluntarily surrendered by the act of proving.

Why was it left optional with creditor to prove, and thus surrender his proceedings at law, if, whether he proves or not, he is to lose all benefit of his proceedings?

It can hardly be said to be *optional* with a creditor, whether or not to surrender his proceedings, if he is restrained by injunction, and so compelled to lose all benefit of his proceedings.

It is admitted that the lien or security created by an attachment is a conditional security only, dependent on the recovery of judgment, and due proceedings on the execution.

A mortgage also is a conditional security, and depends both for its validity and extent upon the establishment of a debt secured.

If the discharge, if and when obtained, may be pleaded in bar of the suit, and therefore, and thereby, the attachment would be discharged, why is not the same argument equally good in relation to the validity of a security by mortgage?

So an attachment may in strictness be called only an inchoate lien. But it is still a security.

Whatever its precise nature may be, the Statutes and Courts of Massachusetts call it and hold it to be a valid lien and security.

In Connecticut, under the old bankrupt law of the United States, it was expressly decided that an attachment created a lien on the property, attached within the meaning of the sixty-third section, and that when the discharge was pleaded

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in bar of the suit, judgment would be rendered against the bankrupt, but execution issued against the property attached only. *Ingraham v. Phillips* (1 Day, 117); *Barber v. Min-turn* (1 Day, 136).

If the property attached is more than sufficient to pay the attaching creditor, the assignee may relieve it. This is provided for in section eleven of the law. Or if the property is sold on execution, the surplus would be paid to the assignee, who stands in place of the debtor.

STORY J. This is the case of an application by Foster, a petitioner for the benefit of the Bankrupt Act of 1841, ch. 9, against William Appleton and others, who were severally attaching creditors, some of whose attachments were made upon his personal estate and others upon his effects in the hands of his debtors under the trustee process, before the date of the petition, Foster not having as yet been declared a bankrupt, because the time has not yet arrived, when the petition is to be heard in the District Court. The petition, which is on the equity side of the Court, seeks relief against these attachments by a decree of the District Court, for an injunction enjoining the creditors from further proceedings against the property attached, and requiring them to surrender these attachments, or for an injunction and other relief against these attaching creditors, according to the view, which the Court shall take of the matter.

The discussion has taken a very wide range, and the questions arising in the case have been argued with great ability and learning. In the view, which I have taken of the questions, I do not deem it necessary to go into a minute examination of the weight and bearing of the numerous authorities cited at the bar, some of which certainly seem open to much juridical criticism and doubt, from the looseness of the language used, as well as from the extraordinary nature and extent of some of the propositions asserted in them. And,

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after all, the questions must mainly depend for their decision upon the true character and effect of an attachment upon mesne process under the laws of Massachusetts, and the extent, to which such an attachment is recognized and protected, or is maintainable under the Bankrupt Act of 1841, ch. 9, either by the express savings of the act, or by the policy and general provisions thereof. The attachments under the trustee process must be governed by similar considerations, and therefore they will require no separate notice.

Before proceeding to consider the questions, which have been argued, I wish to say a few words as to the jurisdiction of the District Court in the premises. And here I lay it down as a general principle, that the District Court is possessed of the full jurisdiction of a Court of Equity, over the whole subject-matters, which may arise in bankruptcy, and is authorized by summary proceedings to administer all the relief, which a Court of Equity could administer, under the like circumstances, upon a regular bill and regular proceedings, instituted by competent parties. In this respect, the act of Congress, for wise purposes, has conferred a more wide and liberal jurisdiction upon the Courts of the United States than the lord chancellor, sitting in bankruptcy, was authorized to exercise. In short, whatever he might properly do, sitting in bankruptcy, or sitting in the Court of Chancery, under his general equity jurisdiction, the Courts of the United States are by the Act of 1841 competent to do. So that the question resolves itself, so far as the exercise of jurisdiction for relief in this case is concerned, into this, whether it is a fit case for interposition and relief by a Court of equity.

Having disposed of this preliminary matter, let us now proceed to the consideration of the questions raised at the bar. And in the first place, what is the nature and effect of the common writ of attachment, as mesne process, (for the case, which I mean here to consider, is that of William Appleton,

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by an attachment upon mesne process, and not of the other attaching creditors and trustees, under the foreign attachment act), under the laws of Massachusetts. It contains a command to the sheriff, or other proper officer, to attach the goods or estate of the defendant, and for want thereof, to take his body. The officer is at liberty, under that precept, to take the goods and chattels, or the lands and other hereditaments of the defendant, or both, to answer the exigency of the writ. If the officer attaches the goods and chattels of the defendant, he takes them into his possession, and they are then deemed to be in custody of the law, and are to remain under his care and possession, to abide the final judgment in the suit. If lands or other hereditaments are attached, they are not taken possession of by the officer; but they are bound by the attachment from the time, when it is made, if all the regular proceedings are had. And in such a case, the creditor is at liberty, if he obtains judgment in the suit, to levy his execution upon the goods and chattels, or lands, or either of them, until he has obtained satisfaction; and his attachment gives him a priority of right of satisfaction, out of the property attached, over all other creditors, for thirty days after his judgment, and no longer. If the judgment is for the defendant, the attachment is forthwith dissolved by mere operation of law. Such is the general character and operation of the common process of attachment (for I need not go into minor particulars); and by the very language of the laws of Massachusetts, the property so attached, whether real or personal, is "held as security to satisfy such judgment as the plaintiff may recover."¹ But whether it be such a security, as is within the savings of the Bankrupt Act of 1841, ch. 9, is quite a different question, and will come more directly under consideration hereafter. The Supreme Judicial Court of Mas-

¹ Revised Statutes, 1836, part iii. tit. 2, ch. 90, § 23, § 24.

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sachusetts, have (as I think), taken the true view of it, in the case of the *Atlas Bank v. the Nahant Bank* (23 Pick. R. 488), where they declared, that an "attachment on mesne process is to be considered as a remedy merely given and regulated by law, to enable one creditor, who is proceeding for himself alone, to obtain satisfaction of his debt; and when several are so proceeding, he, who is first in time, is prior in right." But the Court immediately adds; "But in equity, all these priorities give way to a general proceeding, which has for its object to distribute all the effects of a debtor, by paying the whole, if there be assets, and then proceeding for a ratable distribution. If the property turn out to be sufficient to pay the whole, any priority by attachment would be useless; if not, it would be unjust." Now, this latter language is exceedingly pointed, and applicable to the case now before the Court; for the Bankrupt Act has for its object and policy a distribution of all the assets of the debtor equally among all his creditors; and it positively prohibits any preference to be made by the debtor in favor of any creditor, in contemplation of bankruptcy. And hence a commission and decree, declaring a man to be a bankrupt, has been emphatically said to be a statute execution for all the creditors.¹

But it is said, that an attachment under our law constitutes a lien upon the property attached; that it is a perfect, fixed, and vested lien, as much so as a lien by a mortgage upon personal estate; that it gives a vested interest in the real estate attached, so that the creditor may dispute the validity of a will thereof; and that it is deemed equivalent to a title by purchase for a valuable consideration. And certain authorities are 'relied on to establish and confirm these positions. One of these authorities, I own, is very direct to the position,

¹ See *Barker v. Goodwin* (11 Ves. 78—80); Cooke's Bankrupt Law, ch. i., p. 5, edit. 1799; *Twiss v. Murrey* (1 Atk. R. 67); *Ex parte Knott*, (11 Ves. 606, 619).

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that an attaching creditor of real estate has a right to contest the validity of a will of that estate before he has obtained judgment, and levied his execution thereon ; that is, before it is ascertained, whether he has any debt due to him, or any right to make an attachment. If this be so, I can only say, that I am unable exactly to comprehend the grounds of the decision, and bow to it solely as a decision founded upon the local law, that is binding upon this Court. But I must treat it as an exception to the general rule, and I am not called upon to give it a more enlarged operation. It seems to stand (as may be respectfully submitted) upon the very verge of the law, *inter apices juris* ; and may enable any stranger, however remote, and without any just debt or claim, by a mere attachment, to interpose himself as a party to contest the most solemn and well-authenticated will. It asserts directly, that a creditor acquires an *interest* in real estate by a mere attachment, although never consummated by a judgment, and although he may never levy thereon, nor indeed have any right to levy thereon. It appears to me, that most, if not all, the other cases cited at the bar, have been pressed beyond their fair and reasonable bearing, into the service of the argument, at least since the alterations of our law under the provisions of the Revised Statutes of 1836.

It is true, as asserted at the bar, that an attachment upon mesne process is constantly spoken of in our Reports as a lien ; and doubtless it is so, in a very general sense of the term, adopted by way of analogy and illustration, rather than from a very exact resemblance, which it bears to liens, generally recognised, as such, at the common law, or in equity, or in maritime jurisprudence. But, as has been truly said by Lord Coke, No simile holds in every thing. *Nullum simile quatuor pedibus currit*.¹ Lord Tenterden has said, that the word

¹ Co. Litt. 3, a.

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lien, in its proper sense, in the law of England, imports, that the party is in possession of the thing, which he claims to detain; and that where there is no possession, actual or constructive, there can be no lien.¹ And this is generally true, perhaps universally true, at the common law, independently of statutable provisions, or of special contract. The doctrine was explicitly asserted by Mr. Justice Buller in delivering his opinion in the great case of *Lickbarrow v. Mason*, before the House of Lords, (6 East, R. 21, note; Id. 25), where he says; "Liens exist at law only in cases, where the party, entitled to them, has the possession of the goods; and if he once part with the possession after the lien attaches, the lien is gone," Mr. Justice Grose, in delivering the opinion of the Court in *Hammonds v. Barclay* (2 East, R. 227, 235), said; "A lien is a right in one man to retain that, which is in his possession, belonging to another, till certain demands of him, the person in possession, are satisfied." The same thing has been often insisted upon by other judges.² But in the maritime law liens are recognised, independently of possession, actual or constructive; such as in cases of seaman's wages, and bottomry bonds and liens by material-men upon foreign ships. But in such cases, there is no pretence of a vested lien, until the labor or service is complete, or the voyage ended, and the contract become absolute. Until that period, it is merely inchoate, and conditional, and imperfect. In equity, also, liens exist independent of possession, either actual or constructive; as, for example, the lien of a vendor on the land

¹ Abbott on Shipping, part iii. chap. 1, § 7, p. 171, Amer. edit. 1829; Id. part iv chap. 1, § 8, p. 220, 6th edit. by Shea, 1840; 1 Story Eq. Jurisp. § 506; 2 Story Eq. Jurisp. § 1215 to § 1254.

² *Wilson v. Balfour* (2 Campb. R. 579); *Ex parte Heywood* (2 Rose, 537); *Heywood v. Waring* (4 Campb. R. 291); *Gladstone v. Birley* (2 Meriv. R. 404); *Hallett v. Bonsfield* (18 Ves. 188); *Giles v. Grover* (6 Bligh, R. 340).

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for the unpaid purchase-money. But it has been long the established doctrine in equity, that a lien is not, in strictness, either a *jus in re*, or a *jus ad rem*; that is, it is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing.¹ It is, therefore, at most a simple right to possess and retain property, until some charge attaching to it is paid or discharged; or a mere right to maintain a suit *in rem* to enforce payment of the charge.² Mr. Justice Buller, speaking of liens at the common law, is equally expressive. He says: "Liens are not founded on property; but they necessarily suppose the property to be in some other person, and not in him, who sets up the right. They are qualified rights."³

Now, an attachment does not come up to the exact definition, or meaning of a lien, either in the general sense of the common law, or in that of the maritime law, or in that of equity jurisprudence. Not in that of the common law, because the creditor is not in possession of the property; but it is *in custodia legis*, if personal property; if real property, it is not a fixed and vested charge, but it is a contingent, conditional charge, until the judgment and levy. Not in the sense of the maritime law, which does not recognise or enforce any claim as a lien, until it has become absolute, fixed, and vested. Not in that of equity jurisprudence; for there a lien is not a *jus in re*, or a *jus ad rem*. It is but a charge upon the thing, and then only, when it has, in like manner, become absolute, fixed, and vested.

In truth, it bears a closer resemblance to the lien created

¹ See *Brace v. Duchess of Marlborough* (2 P. Will. R. 491;); 1 Story on Eq. Jurisp. § 506; 2 Story on Eq. Jurisp. § 1215, § 1216, and the cases there cited; *Ex parte Knott* (11 Ves. R. 617); *Conard v. The Atlantic Ins. Co.* (1 Peters's R. 386, 441, 442).

² *Ibid.*

³ *Lickbarrow v. Mason* (6 East, R. note, p. 21, 24).

by a judgment upon the real estate of the debtor. But that is only a general lien or charge over all the real estate of the debtor, to be enforced by an *elegit*, or other legal process, upon such part of the real estate of the debtor as the creditor may elect. And it is not a common law lien ; for it had its origin in the statute of 2d Westminster, 13 Edw. I. stat. 1, chap. 18, giving the right to an *elegit*. But there is, however, this strong and clear distinction between the case of a lien by judgment, and a lien by an attachment, that the former takes place only, when the debt is ascertained and fixed by the judgment ; whereas the latter is before the debt is ascertained, and is altogether future, and contingent upon a judgment being rendered in the suit in favor of the creditor. Yet a judgment creditor has never been held in England to have any interest in the land ; but only a sort of preëmptive right or lien to acquire it by an extent upon an *elegit* ; and then his title relates back to the time of the judgment, so as to cut down all intermediate incumbrances, sales, and other puisne titles. Yet a judgment creates no interest in the land ; and therefore, though the creditor should release all his right to the land, he might extend it afterwards.¹ It was very justly observed by the Master of the Rolls (Sir Joseph Jekyll), in *Brace v. The Duchess of Marlborough* (2 P. Will. 491), that all, that the creditor has by the judgment, is but a mere lien upon the land ; but *non constat*, that he will ever make use thereof. If, then, a lien be not, in the sense of the law, founded in property ; if it be not an interest in property, nor even a *jus ad rem* ; upon what ground can it be argued, that it is equivalent to a mortgage or a pledge ? In the former of those cases, the immediate right and title to the general property passes at law to the mortgagee, who becomes and is the positive owner, liable to have it divested by a condition subsequent. In

¹ *Brace v. Duchess of Marlborough* (2 P. Will. R. 491).

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the latter, a special property passes to the pledgee, accompanied and conferred by the possession thereof. There is no ground to assert either of these considerations to be true in respect to the lien of an attaching creditor. The possession is not in him to any intent or for any purpose. The property of the debtor is not divested; and the possession thereof is in the attaching officer, holding it *sub modo*, and merely as bailee, for the purposes of the law; that is, the possession is in *custodiâ legis*.

The nature and character of a lien on lands, created by a judgment, were very fully expounded by the Supreme Court of the United States, in the case of *Conard v. The Atlantic Insurance Company* (1 Peters's R. 386, 441, 443); and, on that occasion, the Court took the distinction between the rights acquired by a mortgage, and those acquired by a judgment; and, among other things, said; "Now it is not understood that a general lien, by judgment on land, constitutes, *per se*, a property, or right, in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of his judgment, so as to cut out intermediate incumbrances. But, subject to this, the debtor has full power to sell, or otherwise dispose of the land. His title to it is not divested or transferred by the judgment to the judgment creditor. It may be levied upon by any other creditor, who is entitled to hold it against every other person except such judgment creditor: and even against him, unless he consummates his title by a levy on the land, under his judgment. In that event, the prior levy is, as to him, void; and the creditor loses all right under it. The case stands, in this respect, precisely upon the same ground as any other defective levy, or sale. The title to the land does not pass under it. In short, a judgment creditor has no *jus in re*,

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but a mere power to make his general lien effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of the sale, into the hands of the vendor or vendee; or to claim the purchase money in the hands of the latter. It is not like the case where the goods of a person have been tortiously taken and sold, and he can trace the proceeds, and waiving the tort, chooses to claim the latter. The only remedy of the judgment creditor is against the thing itself, by making that a specific title which was before a general lien. He can only claim the proceeds of the sale of the land, when it has been sold on his own execution, and ought to be applied to its satisfaction."

The case of an attaching creditor is not near so strong, as that of a judgment creditor, who has obtained a *fiery facias*, under which the sheriff has actually seized the goods of the judgment debtor to satisfy the same. And yet in this very case, it is perfectly clear, that before a sale, the general property of the debtor is not divested, and that the creditor does not, under the levy upon the *fiery facias*, acquire any interest or right in the property. The subject underwent a very elaborate consideration of all the judges, in the case of *Giles v. Grover* (6 Bligh's R. 279), where the main question was, whether the crown, upon an *exeat* issuing on behalf of the crown, after a levy on the goods of the crown debtor, under a *fiery facias* against him in favor of a private creditor, but but before a sale under the *fiery facias*, was entitled to a priority of satisfaction before the private creditor, or not. It was held by all the judges, who delivered their opinions in the House of Lords, (except Mr. Justice Gaselee and Mr. Justice Littledale), that it did. The two latter judges held the contrary opinion. But upon that occasion, all the learned judges concurred in opinion, that the general property of the

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debtor in the goods was not divested by the levy on the *feri facias*, but only when a sale thereof had taken place ; that the creditor had no interest or title whatsoever, nor even a lien in the property ; but, at most, that the sheriff had, for his own protection, merely a special property, (as some of the judges thought), or a lien, (as others thought), or (as a majority of the judges thought), that the goods were in the custody of the law, and the sheriff held them as bailee, and in that character *virtute officii*. Lord Chief Justice Tindal has expressed the true position of the sheriff, in delivering his opinion in the case above cited, in the House of Lords. Speaking of the case of the goods seized under the *feri facias* before the sale, he said ; “The goods are not sold ; they are only on the way to be sold. It would be a better definition of the sheriff’s relation to these goods, to say, he has them in his custody, under a power to sell them, than any actual interest or property in them. His situation, indeed, cannot be better defined, than by saying, the goods are in *custodiâ legis*, a phrase, which plainly distinguishes a mere custody and guardianship of the goods from a change of property ; so far, therefore, as a special property in the goods is necessary for their safe custody against wrong-doers, and to render the execution of his public duty useful to the judgment creditor, so far he may be said to have property. But beyond this, as against the rights of adverse claimants, there is no authority for saying, that he has any property at all.” Lord Tenterden, in the same case said ; “It has been argued, that the property is vested in the sheriff, because there are authorities to show, that the sheriff, if the property be taken out of his hand, may maintain an action of trover against the wrong-doer. Now, actions are maintainable upon a ground perfectly distinct from the right of property. They are maintainable upon the ground of possession. Any man in the possession of goods, whether as bailee, or otherwise, may, in his own name, maintain an action.

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The power, therefore, of bringing an action of this kind, does by no means prove, that the property is in the sheriff." His Lordship immediately added ; " It is supposed by some, that the property is in the judgment creditor. But it is perfectly clear, upon consideration of the subject, that the judgment creditor has no property in the goods, while they remain in the hands of the sheriff. If the sheriff executes the process of the Court, and serves a bill of sale to the plaintiff in the action, then the judgment creditor obtains the property ; but until that is done, while the goods are in the possession of the sheriff, they are in the custody of the law, but still remain the property of the debtor, to whom they originally belonged." This last doctrine, that the creditor has no property by the seizure, was (as has been already stated) unanimously affirmed by all the judges ; and the doctrine maintained by Lord Chief Justice Tindal and Lord Tenterden, and the majority of the judges, was adopted by the House of Lords.¹ Mr. Justice Patterson said ; " The goods are in substance in *custodiâ legis* ; the seizure made by the officer of the law is for the benefit of those, who are by law entitled. It is made against the will of the debtor, and no property is transferred, by any act of his, to the sheriff. *In this respect it differs from all cases of special property, and of charges on goods, created by the debtor*, while he has the absolute dominion over the goods."² Here we see clearly stated the distinction between a title by conveyance, or contract of the debtor, and a seizure under process of law. In confirmation of this view, Mr. Baron Alderson said ; " The true description of the state of the property is, that it is in the custody of the law ; whereas in the case of the factor, wharfinger, pawnee, or equitable mortgagee,

¹ See *Giles v. Groves* (6 Bligh R. 289, 290, 291, 292); Id. 312, 313, 314, 317, 318, 319, 322; Id. 333, 334, 335, 336, 337, 338, 339, 340, 341; Id. 367, 368, 371, 372; Id. 374, 375, 376, 384; Id. 404, 405, 406; Id. 421, 431.

² Ibid. p. 292-317.

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it is in the custody of the party himself, being a beneficial interest under a valid contract.¹ Lord Chief Justice Tindal took notice of the same distinction between the case of a seizure in execution, and goods being pledged, or lands mortgaged; that the one amounted to an alienation of the property *pro tanto*, the other gave only an inchoate claim on the goods; or, to use his own expression, the goods "are on their way to be sold."²

Mr. Justice Taunton, in answer to the argument urged at the bar, that by the seizure on the execution, the judgment creditor had a lien on the goods, or a special property therein, and, therefore, that the Crown could only take, subject to that lien or special property, peremptorily denied the doctrine; and said, "This special property is in the sheriff, not as trustee for the judgment creditor; but for the purpose of his own protection. Neither had the judgment creditor in this instance any lien on the goods."³ And he added; "How can the doctrine of lien to retain these goods be applied to this judgment creditor, who had no possession; the goods being in the possession of the sheriff?"⁴ And again, in answer to the argument, that the judgment creditor had by the seizure at least a security for his debt, he admitted that, as it had been stated by the Court, in *Morland v. Pellatt*, (8 B. & Cresw. 822); but immediately added, (what is most important to be here noticed,) that "the security may be vested and certain, or it may be contingent and defeasible. It does not necessarily import present property, nor even beneficial interest." "*A jus tertii* might interpose, and destroy it."⁵

The truth is, that goods were, at the common law, bound from the teste of the writ of execution, whether it was a

¹ Ibid. p. 318.

² Ibid. p. 437.

³ Ibid. p. 340.

⁴ Ibid. 341.

⁵ Gill Hist. Excheq. 89.

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levari facias, or a *fieri facias*, because otherwise the debtor, by an alienation of the chattels, might disappoint the execution.¹ But this has been since altered by statute, so that on a *levari facias*, or *fieri facias*, the goods are bound only from the time of the delivery of the execution to the sheriff; and as to real estate, it is bound from the time of the judgment, upon the construction of the statute of Westminster.² When, therefore, the word lien is used in cases of this sort, it is used in a peculiar and general sense, and indicates no more, than that the goods or lands are bound by the judgment, and not that the judgment creditor has any interest or property therein. As to the goods, they are bound only from the delivery of the execution to the sheriff, as against the debtor himself: but still a sale by him in market overt would be good.

I have dwelt the more upon these authorities, because if they present, as I think they do, the true state of the law, even in the case of a seizure under execution, they necessarily apply with vastly greater force to the case of a mere attachment, which, at most, can be no more than a contingent, conditional, lien or security, to satisfy the judgment of the creditor, if he ever obtains one; whereas, on an execution, the debt has been already ascertained and fixed by the judgment. Nor do I think that the decisions in the Massachusetts Reports, (except that of *Smith v. Bradstreet*, (16 Pick. 254,) construing them reasonably, and with reference to the case before the Court), inculcate a different doctrine. In the very case of *Grosvenor v. Gold* (9 Mass. R. 209, 210), Mr. Justice Sedgwick admitted the lien by an attachment to be merely a conditional security. He said; "By an attachment the plaintiff has a lien upon the subject *provisionally*, that is,

¹ *Giles v. Groves* (6 Bligh, R. 315, 316; 3d. 367, 435, 436).

² *Ibid.* *Louthal v. Tomkins* (2 Eq. Abridg. 381); *Smallcomb v. Cross* (1 Ld. Raym. 251); *Phillips v. Thompson* (3 Ld. R. 191); *Payne v. Drew* (4 East, R. 523.)

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to the amount of the judgment he may finally recover." In *Denny v. Willard* (11 Pick. R. 524), Mr. Justice Morton, in delivering the opinion of the Court, said: "The special property (after the attachment) was in the officer making the attachment, unless he had lost the lien by giving up the possession to the general owner." In *Fettyplace v. Dutch* (13 Pick. R. 388, 392), the Court said, that an attachment constitutes a lien; but the general property remains in the owner, subject to that lien; and he may sell the same subject to the lien. In *Arnold v. Brown* (24 Pick. R. 89, 95), the Court said: "An attachment constitutes a mere lien on the property, and the general owner may as well sell, subject to that lien, as any other. The effect of the sale will be to pass the general property, incumbered by the attachment. If that be extinguished by the settlement or failure of the suit, or the neglect to levy an execution in thirty days after the judgment, the sale of the property will become absolute, and the purchaser will hold it free of the incumbrance." Now, here we have admitted, in the most explicit terms, that the lien or security, call it whichever you may, is merely conditional, and depends upon the event of the suit. It is not a present, fixed, vested interest in any one; and certainly not in the creditor.

But it has been said, that in cases of foreign attachment under the custom of London, the attaching creditor had a lien or pledge of the goods attached in the hands of the garnishee; and although they were but a pledge to draw the defendant to answer, yet that before the statute of 21 Jac. i. ch. 19, s. 9, it was deemed such a security of the debt, that if the defendant became bankrupt after the attachment, and before the recovery of judgment, the commissioners could not take or assign the goods, except subject to the lien and security of the attaching creditor. For this position great reliance is placed upon Goodinge on the Bankrupt Law, p. 107, edit.

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1726. Now, I know of no authority for that position ; and the case of *Bingley v. Warcup* (3 Keble R. 480), cited by Gooding in his text, does not support it ; nor, as far as I can trace it in the reports, has any such doctrine ever been established by the Courts of law in the construction of the statute of Jac. I. ch. 19, s. 9, although that clause of the statute has on various occasions received ample commentary from the Courts. Its construction was a good deal considered in the case of *Giles v. Groves* (6 Bligh R. 277) ; and, indeed, the whole train of reasoning in that case is against the doctrine. If it be true, that a foreign attachment is but process to draw the party to answer, still, if he does not appear and answer, or give security, the suit proceeds against the garnishee. The truth is, that a foreign attachment is like a common attachment on mesne process, as the Supreme Judicial Court of Massachusetts have declared it to be, a remedy, merely given and regulated by law, to enable a creditor to obtain satisfaction of his debt ;¹ and, like every other remedy, it is liable to be defeated by any act, that bars or takes away the remedy or right to judgment under it. Ever since the statute of James I. ch. 19, there could be no possible doubt ; for that defeated all executions not actually executed, as well as all foreign attachments, after the act of bankruptcy, if a commission issued thereon, down to the latest statute in England. The policy, therefore, upon this subject, for at least two hundred years, has been uniform ; and I doubt not was so from the earliest period of the bankrupt laws.

I have gone over the grounds thus suggested, not because my judgment rests upon them, but because they were mainly relied upon at the argument to support the title of the attaching creditor, and to defeat the petition. My judgment turns, however, upon other and distinct grounds. Assuming, for

¹ *Atlas Bank v. Nahant Bank* (23 Pick. 488).

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the purposes of the argument, that the attachment constitutes a lien or security to or for the benefit of the attaching creditor, still it is but a contingent or conditional lien or security, arising under a mere remedial process, and, therefore, the question must still remain for consideration, whether it is such a lien or security, as is within the savings of the Bankrupt Act of 1841. And if it be within the savings, then there still remains the ulterior question, whether the attaching creditor has a right to go on, without any interposition of the District Court, sitting as a Court of Equity in bankruptcy, and obtain a judgment in his suit, before the bankrupt can obtain his discharge, which discharge, if obtained before a trial, would constitute a complete bar to the suit; and thus the attaching creditor, by a race of diligence, be allowed to obtain and to complete a preference in violation of the whole policy of the Bankrupt Act, which is an equal distribution of the assets among all the creditors.

Now, the saving, in the second section of the Bankrupt Act of 1841, which has been pressed so much at the argument, is in the following words: "That nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." Now, certainly, the natural interpretation of these words "liens, mortgages, and other securities on property real or personal," would seem to be, that they referred to things of a like nature; or, as the maxim of law is, each may be known from its associates, (*Noscitur a sociis*). The words may all be perfectly satisfied by treating them, as referring to liens fixed and vested in the party by a consummate title, such as liens by contract, resting on possession, or absolute by law, such as pledges, and not merely

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inchoate and conditional liens, dependent upon a mere remedial process. The term "securities" follows "mortgages," which are clearly vested rights under the grant of the party, defeasible only upon a future fulfilment of some condition subsequent. Securities of this nature may be by a deposit of title deeds, or conditional assignments of choses in action, or the lien of a vendor for unpaid purchase money. If we look back to the words of the enacting clause of this same section, to which the saving is appended as a proviso, we shall see, that there, the enumeration is confined to "securities, conveyances, or transfers of property or agreements made or given" by the bankrupt for the purpose of giving a preference or priority of a creditor, or indorser, or surety, &c. over the general creditors, and which are therefore declared fraudulent. Now, the natural inference certainly would seem to be, that the proviso is carved out of the enacting clause, and saves things *ejusdem generis*. The fifth section, to which also reference is made in the proviso, provides for an equal distribution of all the bankrupt's effects among all his creditors, with one or two exceptions, unimportant in this connexion; and it declares, that creditors, proving their debts under the bankruptcy shall be deemed thereby to have waived all right of action therefor, and all unsatisfied judgments obtained thereon. So that the policy of the act, as to an equal distribution, is here made most manifest and positive. The 14th section of the act contains a provision, that the assignee may redeem, under the order of the Court, "any mortgage or other pledge or deposit or lien upon any property real or personal, whether payable *in presenti*, or at a future day, and to tender a due performance of the conditions thereof." The words "mortgage or other pledge, or deposit or lien" in this clause clearly can mean nothing else, than such as arise from contract, and are of a present, fixed, vested, and ascertainable value. And it would be impossible to strain them, so as to

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include liens or securities by an attachment upon mesne process or other remedial process. And yet they certainly reflect great light upon the meaning of the like words in the proviso of the second section.

But I do not propose to rest my present judgment upon any construction of the words, limiting them, so as to exclude inchoate, conditional liens, arising, not under contract, but under remedial mesne process. Assuming such liens to be within the protection of the proviso (which is an admission, which I make merely for the sake of argument, and I am by no means satisfied, that it is a correct exposition of the words or intent thereof,) still there remains behind a much more grave and pressing difficulty, to which I have heard no sufficient answer at the bar.

It is conceded on all sides, that unless the attaching creditor obtains a judgment in his favor in the suit, his attachment is gone. It is plain, therefore, that it gives no absolute right of any sort. It merely puts the remedy in progress. It is to my mind as perfectly clear and incontrovertible, that if the bankrupt, before any trial or judgment in that suit, obtains a discharge, that discharge is by the express terms of the Bankrupt Act (s. 4,) a full and complete discharge from all his debts provable under the bankruptcy, of which the debt sued for must be one; and of course, that it is pleadable as a bar to that very suit of the attaching creditor, in the nature of a plea *puis darrien continuance*. There is another provision in the third section of the act equally important to be considered, namely, that from the time of the decree in bankruptcy, all property and rights of property, of every name and nature, of the bankrupt, are devested out of the bankrupt, and become vested in the assignee upon his appointment; and it is further declared, "that all suits in law or in equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion in the

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same way and with the same effect, as they might have been by such bankrupt." And it goes on further to provide that "the assignee so appointed shall be vested with all the rights, titles, powers and authorities to sell, manage and dispose of the property and rights of property of the bankrupt, and to sue for and defend the same, &c. as fully to all intents and purposes, as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy declared as aforesaid." The act, therefore, manifestly contemplates, that as to all property and rights of property of the bankrupt, and as to all suits in law or equity pending, in which the bankrupt is a party, the bankrupt is to be treated, as if he were *civiliter mortuus*, and all his property and rights of property were vested in the assignee, as his executor or administrator. The moment, that the decree in bankruptcy is passed, it relates back, for all the purposes of the act, to the time of the petition; and as soon as the assignee is appointed, all the rights, titles, powers and authorities of the bankrupt vest in him by relation from the same period. How then, pending the proceedings in bankruptcy, before or after the decree, can the attaching creditor be permitted to go on with his suit, and proceed to trial and judgment, when there is, and can be, no party properly before the Court to appear and defend the suit? If the attaching creditor had knowledge of the facts, it would be a fraud upon the bankrupt act for him to proceed in his suit, and to get a judgment before an assignee was appointed, or was in a situation to appear and defend the suit. Nor could the Court, where the process should be pending, properly proceed in the cause, until it had been ascertained, whether the bankrupt was entitled to, and had received his discharge or not. If the bankrupt should receive his discharge, he would be instantly entitled to plead it in bar of the suit. And if the attaching creditor should forthwith proceed to judgment without waiting for the time,

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when such discharge would or might be obtained, and be properly pleaded, either by the bankrupt, or by the assignee, or by both, in bar of further proceedings in the suit, and should obtain satisfaction of his judgment, I do not perceive, how, consistently with the principles of a Court of Equity, the creditor could be entitled to enforce the judgment, or to hold the money. The judgment must, to all intents and purposes, be treated as a fraud upon the Bankrupt Act, and as intended to defeat the just rights of the other creditors of the bankrupt.

It is precisely in this view, that it has struck me during the whole course of the argument, that no attaching creditor could be thus permitted by a Court of Equity, by a mere race of diligence, while the bankrupt proceedings were in progress, to overreach, and defeat the just rights of the other creditors, or the right of the bankrupt, if entitled to a discharge, to plead the same in bar of a judgment in the suit. I agree, that the Court ought not to dissolve the attachment, or to take away the inchoate rights of the creditor to the security thereof, until it is ascertained by a decree, whether the party is a bankrupt, and whether he is entitled to a discharge from his debts. The Court may, and, indeed, ought to allow the proceedings to be entered in the proper Court, and to be continued, if the creditor elects so to do, until the discharge is obtained; but not to proceed in the mean time to trial or judgment; for if the petitioner should never be declared a bankrupt, or should not obtain any discharge, it may be, that there may be a judgment against him *in personam*, even supposing, (which I do not decide), that, in such an event, the attachment would be gone by the operation of the Bankrupt Act of 1841. But if a discharge should be obtained, I can entertain no doubt, that no judgment whatsoever could be had in the suit against the bankrupt, and that he and the

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assignee might each plead the discharge in bar of further proceedings.

It strikes me, therefore, as perfectly clear, that, under such circumstances, it is the duty of the District Court, as a Court of Equity, sitting in bankruptcy, in order to prevent irreparable mischiefs, and the defeating of the true objects and policy of the act, to interpose by way of injunction to control the attaching creditor from proceeding further in his suit, than is necessary to protect his ulterior rights, and that he must act in the suit under the direction of the District Court in the premises.¹

There is no novelty in this course. On the contrary, it is the common course in all cases, where upon the application of any creditor, or of an administrator or executor, a Court of Equity takes upon itself the administration of the assets of a deceased debtor. As soon as the decree for the administration is passed by the Court, taking upon itself the administration of the assets, the executor or administrator, or any creditor, is entitled to an injunction to prevent any other of the creditors from suing the executor or administrator at law, or further proceeding in any suit, already commenced, except under the direction and control of the Court of Equity, by which the decree is passed; for, under such circumstances, the Court will not suffer a race of diligence by different creditors, each striving for an undue mastery, or preference, or priority of payment out of the assets, to prejudice the rights of the others.² The decree in such a case is treated as a judgment for all the creditors. But it is not necessary to put it upon that ground; for when once the administration of the

¹ See *Ex parte D'Obree* (8 Ves. 82).

² Jeremy on Eq. Jurisp. b. 3, pt. 2, ch. 5, p. 538 to 543; 1 Story Eq. Jurisp. s. 549, and note (3); 2 Story Eq. Jurisp. s. 890; Drewry on Injunct. p. 1, ch. 4, s. 2 to s. 7; p. 109 to p. 122; *Thompson v. Brown* (4 John. Ch. R. 619); *Lee v. Park* (1 Keen, R. 714); *Kenyon v. Worthington* (2 Dick. R. 668); *Brooks v. Reynolds* (1 Bro. Ch. R. 183).

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assets is taken by the Court upon itself, as a matter of duty, it must be of course, that it cannot and ought not to permit any creditor to defeat, or to obstruct, or to interfere, with its own proceedings. Now this is precisely the situation of the District Court, as to proceedings in bankruptcy, after a decree in bankruptcy. The Court necessarily takes upon itself the administration of all the assets; and it is its duty to protect the property against all claims of creditors, which are inconsistent with the objects and policy of the act. I have no doubt, therefore, that it is the duty of the District Court to issue an injunction in this case to the attaching creditor, directing him not to proceed in his suit, except under the order and direction of the Court, until it shall be ascertained, whether there is a decree in bankruptcy, and a discharge of the bankrupt, which may be pleaded in bar of farther proceedings. If, indeed, I entertained any doubt upon this subject, (which I certainly do not) I should not entertain any doubt as to the jurisdiction of the Circuit Court upon a bill, filed by the assignee, after his appointment, to overhaul and control, or set aside all the proceedings, had in the intermediate time by the attaching creditor against the rights of the other creditors, and in subversion of the policy and objects of the Bankrupt Act of 1841. It would, therefore, after all, be but a postponement of the evil day, and a mere change from the equity jurisdiction of one Court to the like jurisdiction of another Court having full authority to act in the premises. It appears to me, that the reasoning of the Supreme Judicial Court of Massachusetts in *The Atlas Bank v. The Nahant Bank* (23 Pick. R. 480) is very strong in favor of the doctrine, which I hold upon this subject.

In the opinion here expressed I have not thought it necessary to advert to cases, where the right of the United States to a priority of satisfaction would attach under the laws of the United States. I have no doubt, that that priority would

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overreach any attachment under mesne process by any private creditor in a case of bankruptcy of the debtor. But it has seemed to me better to rest the whole case upon general principles, applicable to all cases of creditors.

It was asked, at the argument, what is to be done, as to the costs already incurred under the attachments? I answer unhesitatingly, that all the costs already incurred are to be borne by the bankrupt's estate; for they must be deemed to have been fairly incurred. But as to future costs, there can be no claim upon the bankrupt's estate; and the creditor, if he chooses to pursue his suit, must do so at the peril of losing all his costs, if the bankrupt obtains his discharge. But if the creditor chooses at once to come in under the bankruptcy, and to prove his debt, I should not hesitate to decree him a priority of satisfaction of the costs already incurred out of the assets before the debts of any of the creditors.

I shall direct a certificate to be accordingly sent to the District Court in answer to the question propounded for the consideration of this Court.

The following order was accordingly sent:

Circuit Court of the United States, Massachusetts District. In Bankruptcy. In the matter of John S. Foster, petitioner. April 30th, 1842. Upon the question certified and ordered to be adjourned into this Court by the District Court, to be heard and determined in this Court, It is hereby ordered and decreed to be certified to the District Court; as follows: That the said William Appleton ought not to be permitted to proceed further upon and under his suit and attachment, named in the petition and answer, except subject to and under the directions of the District Court, until the further order of the District Court, after it shall have been ascertained by a decree thereof, that he, the said Foster, is a bankrupt, entitled to the benefit of the Bankrupt Act; and after it shall also have been ascertained, whether the said Foster is or shall,

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as such bankrupt, be entitled to a certificate of discharge from all his debts provable under such bankruptcy. And that an injunction ought forthwith to issue from the District Court against the said Appleton, and his agents for this purpose. And that in the intermediate time, and until the further order of the District Court, the said Appleton is to be at liberty to enter his said suit in the proper State Court, and to continue the same therein, taking no step, that shall prejudice the rights of the said Foster, or of his creditors, until the further order of the District Court, so as to preserve, if he elects so to do, his attachment in the premises, to abide the final event of the proceedings in bankruptcy, as to the certificate of discharge of the bankrupt.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1839, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon JOHN DAVIS, District Judge.

THOMAS BLANCHARD v. CHANDLER SPRAGUE.

PATENTS for inventions are not granted as monopolies or restrictions upon the rights of the community, but "to promote science and the useful arts," and are to be liberally construed.

The power of Congress to grant to inventors is general ; and it is in their discretion to say, when, and for what length of time, and under what circumstances, the patent for an invention shall be granted.

Congress has power to pass an act, which operates retrospectively to give a patent for an invention already in public use ; but no act will be construed to operate retrospectively, unless such a construction is unavoidable.

In the present case, *It was held*, that the patent was for a machine, and not for a principle or function ; and, therefore, was valid.

THIS was an action on the case for the infringement of a patent right of "a machine for turning and cutting irregular forms."

The facts were as follows : Letters patent were granted to the plaintiff on the 6th of September, 1819 ; and being deemed inoperative, by reason of a defective specification,

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new letters patent were granted on the 20th of January, 1820, for the space of fourteen years. Afterward, by act of Congress passed the 30th of June, 1834, the sole right was granted to the plaintiff, to make, use and vend his invention for the term of fourteen years, from the 12th of January, 1834. This act not being thought to describe with sufficient accuracy the letters patent, to which it was intended to refer, an additional act was passed on the 6th of February, 1839, renewing the act of the 30th of June, 1834, and correcting the date of the 12th of January, 1834, to the 20th of January, 1834. The last act was as follows :

“An Act to amend and carry into effect the intention of an Act entitled an Act to renew the Patent of Thomas Blanchard, approved June 30th, 1834.

“Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the rights secured to Thomas Blanchard, a citizen of the United States, by letters patent granted on the sixth of September, eighteen hundred and nineteen, and afterwards on a corrected specification on the twentieth day of January, Anno Domini eighteen hundred and twenty, be granted to the said Blanchard, his heirs and assigns, for the further term of fourteen years from the twentieth of January, eighteen hundred and thirty-four, said invention so secured being described in said last-mentioned letters as an engine for turning or cutting irregular forms out of wood, iron, brass, or other material which can be cut by ordinary tools. Provided, that all rights and privileges heretofore sold or granted by said patentee to make, construct, use or vend the said invention, and not forfeited by the purchasers or grantees, shall enure to and be enjoyed by such purchasers or grantees respectively, as fully and upon the same conditions during the period hereby granted as for the term that did exist when such sale or grant was made.

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"Sec. 2. And be it further enacted, that any person who had *bonâ fide* erected or constructed any manufacture or machine for the purpose of putting said invention into use, in any of its modifications, or was so erecting or constructing any manufacture or machine for the purpose aforesaid, between the period of the expiration of the patent heretofore granted on the thirtieth day of June, one thousand eight hundred and thirty-four, shall have and enjoy the right of using said invention in any such manufacture or machine erected or erecting as aforesaid, in all respects as though this act had not passed. Provided, that no person shall be entitled to the right and privilege by this section granted, who has infringed the patent right and privilege heretofore granted, by actually using or vending said machine before the expiration of said patent, without grant or license from said patentee or his assignees to use or vend the same.

"Approved, February 6th, 1839."

The plaintiff, in his specification, declares, that "As to the mechanical powers by which the movements are obtained, he claims none of them as his invention. These movements may be effected by application of various powers indifferently. Neither does he claim as his invention the cutter wheel or cutters, or friction wheel as such, nor the use of a model to guide the cutting instrument as his invention. All these are common property, and have been so for years. But he claims as his invention the method or mode of operation in the abstract explained in the second article, whereby the infinite variety of forms, described in general terms in this article, may be turned or wrought." In another part of his specification he says, "In explaining and describing the different modes in which he contemplates the application of the principle or character of his said machine, or invention, he does this in compliance with the requirements of the law, and not

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by way of extending his claim for discovery or invention. His invention is described and explained in the second article of this specification, to which reference is hereby made for information of that which constitutes the principle or character of his machine or invention, and distinguishes it, as he verily believes, from all other machines, discoveries or inventions, known or used before."

In the second article, to which he refers, the plaintiff explains the principle and character of his machine, and the mode of constructing it to effect the different objects to be accomplished, and the mode of operation. This is done at considerable length.

The parties agreed to submit the matters of fact in dispute to a Master instead of a jury, who should report the facts and his opinion thereupon to the Court, in order that his report might be accepted or rejected, as might be deemed right upon a revision of the evidence to be reported, and that the Court might decide upon the whole case for the plaintiff or the defendant; and if the decision should be for the plaintiff, damages were to be assessed according to an agreement between the parties. The substance of the Master's report was as follows:

Upon the first question, whether the plaintiff's specification is couched in terms so full, clear and exact, as to distinguish it from all other inventions, and to enable any machinist, reasonably and competently skilled in the business, to construct the machine, in all its forms, from the directions there given and other drawings annexed, the Master reported his opinion in the affirmative. Upon the second question, whether there is a mode, clearly described in the specification of constructing a machine capable of producing, from one model or pattern, different sizes, preserving the proportions as stated in the specification, he reported, that a mode was described of effecting it sufficiently clear for all practical pur-

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poses. Upon the third question, whether the machine patented and claimed, or any material part thereof, was known or used before the invention thereof by the plaintiff, and particularly whether it was so known to one Woodworth, he reported in the negative. Upon the fourth question, whether the rights secured as alleged in the declaration, had been infringed by the defendant, he reported in the affirmative, and assessed damages at \$521.27.

Upon the hearing before the Court upon the whole case, it was contended by the counsel for the defendant, that the plaintiff's specification was defective, that he claimed the functions of the machine and not the machine itself, and that the description of the machine, so far as it related to the making of things of different sizes from the same model, as well as to the designation of what was intended to be claimed, was unintelligible and wholly insufficient. It was also contended, that the last act for renewing the letters patent was inoperative, inasmuch as it granted only the rights secured by the patents of September 6th, 1819, and January 20th, 1820, both of which were supposed to be void; and that the act was also retrospective, so far as it regarded those who had used the machine between the time of the expiration of the letters patent, and the renewal of them by the last-mentioned act.

Rand and Fiske for the plaintiff. *W. Phillips and Parsons* for the defendant.

STORY J. My opinion is, that the Master has drawn the true conclusions from the facts, which are stated in his Report; and I have not the slightest hesitation in adopting them as the basis of my own opinion. The objections, which have been taken at the argument to the present Patent, granted to the plaintiff by the act of Congress of sixth day of February, 1839, ch. 14, I shall now proceed to dispose of, in as few

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words as may be practicable. In the first place, as to the point, whether the plaintiff has sufficiently expressed in his specification the true nature, character and extent of the invention, which he claims. I am of opinion that he has. Formerly in England, Courts of Law were disposed to indulge in a very close and strict construction of the specifications accompanying patents, and expressing the nature and extent of the invention. This construction seems to have been adopted upon the notion, that patent rights were in the nature of monopolies, and therefore were to be narrowly watched, and construed with a rigid adherence to their terms, as being in derogation of the general rights of the community. At present a far more liberal and expanded view of the subject is taken. Patents for inventions are now treated as a just reward to ingenious men, and as highly beneficial to the public, not only by holding out suitable encouragements to genius and talents and enterprise ; but as ultimately securing to the whole community great advantages from the free communication of secrets and processes, and machinery, which may be most important to all the great interests of society, to agriculture, to commerce and to manufactures, as well as to the cause of science and art.

In America this liberal view of the subject has always been taken ; and indeed it is a natural, if not a necessary result from the very language and intent of the power given to Congress by the Constitution on this subject. Congress (says the Constitution) shall have power " To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Patents then are clearly entitled to a liberal construction, since they are granted not as restrictions upon the rights of the community, but are granted " to promote science and useful arts."

Looking at the present specification, and construing all its

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terms together, I am clearly of opinion, that it is not a patent claimed for a mere function ; but it is claimed for the machine specially described in the specification ; that is, for a function as embodied in a particular machine, whose mode of operation and general structure are pointed out. In the close of his specification, the Patentee explicitly states that his " invention is described and explained in the second article of his specification, to which reference is made for information of that, which constitutes the principle or character of his machine or invention, and distinguishes it, as he verily believes, from all other machines, discoveries or inventions known or used before." Now, when we turn to the second article, we find there described not a mere function, but a machine of a particular structure, whose modes of operation are pointed out, to accomplish a particular purpose, function or end. This seems to me sufficiently expressive to define and ascertain what his invention is. It is a particular machine, constituted in the way pointed out, for the accomplishment of a particular end or object. The patent is for a machine, and not for a principle or function detached from machinery.

Then it is objected, that the description of the mode of constructing the machine is so defective, that it is not practicable for persons skilled in the art or science to which it belongs or relates, to construct the machine. This objection is put an end to by the Master's Report, and the facts there stated by intelligent witnesses.

Then it is suggested, that the grant of the Patent by the act of Congress of 1839, ch. 14, is not constitutional ; for it operates retrospectively to give a patent for an invention, which, though made by the Patentee, was in public use and enjoyed by the community at the time of the passage of the act. But this objection is fairly put at rest by the decision of the Supreme Court in the case of the Patent of Oliver Evans.

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Evans v. Eaton (3 Wheat. R. 545).¹ For myself, I never have entertained any doubt of the constitutional authority of Congress to make such a grant. The power is general to grant to inventors; and it rests in the sound discretion of Congress to say, when and for what length of time and under what circumstances the Patent for an invention shall be granted. There is no restriction which limits the power of Congress to cases, where the invention has not been known or used by the public. All that is required is, that the Patentee should be the inventor.¹

The only remaining objection is, that the act is unconstitutional, because it makes the use of a machine constructed and used before the time of the passage of the act of 1834, ch. 213, and the grant of the patent under the act of 1839, ch. 14, unlawful, although it has been formerly decided, that under the act of 1834 the plaintiff had no valid patent; and so the defendant, if he constructed and used the machine during that period, did lawful acts, and cannot now be retrospectively made a wrong-doer. If this were the true result of the language of the act, it might require a good deal of consideration. But I do not understand, that the act gives the Patentee any damages for the construction or use of the machine except after the grant of Patent under the act of 1839, ch. 14. If the language of the act were ambiguous the Court would give it this construction, so that it might not be deemed to create rights retrospectively, or to make men liable for damages for acts lawful at the time when they were done. The act of Congress passed in general terms ought to be so construed, if it may, as to be deemed a just exercise of constitutional authority; and not only so; but it ought to be construed not to operate retrospectively or *ex post facto*, unless that con-

¹ See also *Evans v. Eaton* (7 Wheat. R. 356); *Evans v. Hettich* (7 Wheat. R. 453).

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struction is unavoidable ; for even if a retrospective act is or may be constitutional, I think I may say, that, according to the theory of our jurisprudence, such an interpretation is never adopted without absolute necessity ; and courts of justice always lean to a more benign construction. But in the present case there is no claim for any damages but such as have accrued to the Patentee from a use of his machine since the grant of the Patent under the act of 1839, ch. 14.

I am, therefore, of opinion, that there ought to be judgment for the plaintiff for the damages agreed by the parties.
Judgment accordingly.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1842, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. PELEG SPRAGUE, District Judge.

ROBERT ROGERS

v.

THE MECHANICS' INSURANCE COMPANY.

IN case of jettison of goods, their value is generally to be estimated at their prime cost, or original value; or, if the vessel have arrived at her port of destination, at their value at such port.

THIS cause came on again at this Term, upon the Report of the Master,¹ SOLOMON LINCOLN, Esq., which was as follows :

"The undersigned, having been appointed, by an agreement of the parties, to ascertain and report the value of a quantity of blubber thrown overboard from barque America, on a whaling voyage, in a gale of wind, as alleged in the declaration in the Plaintiff's writ, met the counsel of the parties above-named, at the office of *Thomas D. Elliot*, Esq., in New Bedford, on the 5th day of January last past; the Plaintiff

¹ See 1 Story's Reports, 603.

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being represented by *Thomas D. Elliot*, Esq., and the Defendants by *Timothy D. Coffin*, Esq.; and at said time and place, I heard such evidence and arguments as were submitted to me, and afterwards, by agreement of said counsel, I received their written statements and arguments upon the questions submitted to me, under said appointment. And now, after deliberate consideration of the evidence and arguments in the case, I do, upon the matter, determine, assess, and award the value of the blubber thrown overboard, having regard to the ordinary chances of weather in the climate, to have been the sum of \$1240. But, if in the opinion of the Court, it was the duty of the assessor to determine the value of the blubber, under the extraordinary circumstances, at the time of the jettison, taking the chances of the gale, its length, and the chance of the ship surviving it, then, in such case, I determine, assess, and award the value of the blubber, at the time of the jettison, to have been the sum of \$918."

The questions arising upon the Report, were submitted to the Court without argument.

STORY, J. My opinion is, that the Report ought to be accepted, and the larger estimate of the value of the blubber (\$1240) ought to be adopted. Nothing could be more conjectural and uncertain, in the ascertainment of the value of goods, thrown overboard in cases of jettison, than to leave that value to be fixed by the probable or possible chances of the escape from the impending danger. On the other hand, the intrinsic value of the article at the time of the jettison, calculated upon its ordinary price, affords a just and uniform rule, applicable to all cases. But, in fact, this is not a new question; but has been long settled by the course of mercantile usage and practice. In every case of jettison, the uniform rule is, to estimate the value of the goods either at the prime cost, or original value, or, at their value at the port of desti-

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nation. The latter rule is inapplicable to cases, where the vessel never arrives at her port of destination, or the article is not, at the time of its jettison, in the perfect state in which it is to be carried there. The former rule, of the prime cost or present value, is, therefore, justly applicable to cases like the present, where blubber, and not oil, is sacrificed, and where the value, it never having been at any market, admits of no absolute ascertainment, other than its ordinary average value on board of the ship under common circumstances. No one ever heard of the value of goods in a case of jettison being ascertained by the diminished value, from the immediate danger in which all the property is placed. In England, the rule adopted is that which has been stated; and Lord Tenterden has discussed its foundation and stated its authority.¹ In the Roman law, the prime cost or value of the goods thrown overboard was always adopted in cases of jettison; but the value of the contributory goods to the loss was calculated by what they would sell for. *Portio autem pro estimatione rerum, quæ salvæ sunt, et earum, quæ amissæ sunt, præstari solet; nec ad rem pertinet, si hæc, quæ amissæ sunt, pluris venire poterunt, quoniam detrimenti non lucri, fit præstatio. Sed in his rebus quarum nomine conferendum est, æstimatio debet haberi; non quanti emptæ sunt, sed quanti venire possunt.*² And this continues still to be the favored rule in some modern maritime nations; but, in general, they have adopted the same rule as the French Law, which ascertains the value of the goods contributing and contributed for, according to their value at the port of discharge.³ But in no country whatsoever, have I been able to find, that any such mode of valuation has prevailed, as that the price is to be the present

¹ Abbott on Shipp. p. 3, ch. 8, § 15, edit. 1829.

² Dig. lib. 14, tit. 2, l. 2, § 2, § 4.

³ Emerig. Assur. tom. 1, ch. 12, § 42, n. C, p. 635, 655; Code de Comm. art. 415; Molloy b. 2, ch. 6, § 4.

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value under the existing peril at the moment of the jettison. It would be as vague and uncertain, as it would be inconvenient and inadequate to the just purposes of compensation.

The sum of \$1240 must, therefore, be allowed as the value of the blubber at the time of the jettison.

SAMUEL HALE AND ANOTHER
v.
WASHINGTON INSURANCE COMPANY.

THE doctrine of *DeLovio v. Boit* (2 Gallison's R. 398), respecting the jurisdiction of the District Courts of the United States, as Courts of Admiralty, over policies of insurance, affirmed.

A collision between two ships on the high seas, whether it result from accident or negligence, is, in all cases, to be deemed a peril of the seas, within the meaning of a policy of insurance.

It seems, that by the French law, the underwriter is not liable for those losses by collision, which are solely occasioned by the fault of the assured or his agents.

Where a loss by collision arises from the negligence of the master and crew, the master is personally responsible; but the ship also is primarily, although not exclusively, liable for the compensation.

All expenses, resulting as a direct and immediate consequence of a peril insured against, are covered by the policy.

Where the ship *Columbia*, through the negligence or fault of her mate and crew, came into collision with the barque *Ritchie*, by which both vessels sustained damage; and the master of the *Columbia*, in behalf of his owners, paid to the owners of the *Ritchie* a certain sum, by way of compromise for the damage sustained by the latter vessel; *It was held*, that the underwriters on the *Columbia* were liable for the sum so paid, as well for the damages as for the repairs and losses by the collision, to the *Columbia*.

LIBEL on a Policy of Insurance, on the ship *Columbia*, for \$12,000, dated the fourth day of February, 1840, for one year, from the eighth day of the preceding January. Ship valued at

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\$32,000. It appeared from the libel, that the Columbia, in the course of a voyage from Liverpool (England) to New Orleans, via New York, on the 9th of April, 1840, in sailing down St. George's channel, by the fault or mistake of the mate and crew of the Columbia, came in collision with an English barque, called the Ritchie, by which both vessels received considerable damage in their hulls, sails, and rigging. The Columbia proceeded on her voyage; and having on another voyage returned to Liverpool, the owners of the Ritchie demanded of the master of the Columbia, the sum of £738, as damages and expenditures occasioned to the Ritchie by the collision; and the master, to prevent a proceeding *in rem*, in the English High Court of Admiralty, for these damages, made a compromise with the owners of the Ritchie, and paid them the sum of £282; and for this sum, as well as the damages for the repairs and losses by the collision on the Columbia, the present suit was brought. The answer substantially admitted the facts as stated in the libel; but denied the liability of the underwriters to repay the said sum, which under the compromise had been paid to the owners of the Ritchie. In the Court below, a decree was pronounced for the libellants, from which an appeal was taken to this Court.

The cause was now argued by *F. C. Loring*, for the Libellants, and by *B. R. Curtis*, for the Respondents.

For the Libellants the argument was as follows. — The insurers are liable for the damage done to the Columbia in her hull, &c. if it amounts to an average, although the cause of the collision was negligence on the part of her master and crew. *Patapsco Ins. Company v. Coulter* (3 Peters, 220); *Waters v. Merchants Insurance Company* (11 Peters, 213); *Colum. Ins. Co. v. Lawrence* (10 Peters, 507); *Williams v. Suffolk Ins. Co.* (3 Sumner, 275); *Shore v. Bentall* (7 B. & C. 794, note).

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The question is, whether they are not responsible for the other damage suffered at the same time: *i. e.* for the claim for damages, to which the owners of the *Ritchie* became entitled.

Where a collision happens through negligence, the owners of the injured vessel have a claim upon the offending vessel, which may be enforced by an action *in personam* or *in rem*. The liability of the vessel is primary, and that of the owners is secondary; the owners being liable merely from the relation they bear to the vessel, and their liability being limited to its value. *The Rebecca* (Ware's Rep. 198, 207; Rev. Statutes, cap. 32, sect. 1).

The liability of the offending vessel arises at the moment of the collision, constitutes a lien upon it, diminishes its value to that extent, and is a loss caused by the collision.

This loss happens at the same time, and from the same cause, as the damage done to the offending vessel, and both constitute the actual loss to the owners from the collision; and the loss being caused by a peril insured against, collision, the insurers are liable for the whole.

The principles on which this claim is founded, are fully discussed in the case of *Peters v. Warren Ins. Co.* (3 Sumner, 389, and 14 Peters, 99); and the cases cannot be distinguished in any important respect. In that case, proceedings were instituted, and a decree was given against the vessel. In this case, there was no decree, the claim being settled by compromise.

If there had been a decree, finding the facts now admitted or proved, it would have been conclusive, and prevented the necessity of proof: in the absence of a decree, the libellants have been obliged to prove their case. In other respects the decree is immaterial.

The whole argument may be stated thus:

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When the thing insured becomes, by law, chargeable with an expense, contribution, or loss, in consequence of a peril insured against, the law considers that peril as the proximate cause of the loss, &c. and holds the insurers responsible for it.

Collision is a peril insured against, and for damages occasioned thereby, the insurers are liable, although it be owing to negligence; and the offending vessel is also liable to make good the damage done to the other vessel.

Such liability being a direct consequence of the collision, and the insurers being responsible for damage by collision, they must indemnify the insured, against their liability to the owners of the injured vessel.

For the Respondents, the argument was as follows:

The owners of the Columbia claim to recover of the underwriters the amount of damages paid by the master to the owners of the Ritchie, for an injury caused by the negligence of the agents of the assured. This proposition seems, however, to be inconsistent with the contract of insurance, and with established principles of law. *Mason v. Sainsbury* (3 Douglas, 61, 245). The case of *The Paragon* (*Peters v. Warren Ins. Co.* 3 Sumner, 389; *S. C.* 14 Peters, 99), is the only authority relied on, as at all approaching this case; and I propose to compare this case with that decision. In the first place, Judge Story relies on the foreign law. No writer on foreign commercial law has, however, sanctioned such a doctrine; but, on the contrary, all the writers cited by him, and some whom he does not cite, declare, that in case of a collision resulting from the fault of the master or mariners of the assured vessel, the damage must be repaired by him who occasioned it; and that the insurers are not answerable. Pothier, *Traite d'Assurance*, No. 49, 50; 1 Emerigon, 414, 416; Boucher, 1500, 1501, 1502; *Mod. Code de Com.* 350, 407; Sautayra's *Com.* 7, 223; Boulay Paty, *Cours du*

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droit Com. 14 to 16 ; Dig. lib. 9, tit. 2, l. 29, § 2 ; Valin, b. 3, tit. 7, a 11 ; Bynkershoek, *Quæstiones privati Juris*, b. 4, c. 18, 19, p. 679 ; Laws of Wisbuy, art. 36. So, also, the law of Hamburg imposed one half the loss on each vessel as a general average. 3 Sumner, R. 389 ; S. C. 14 Peters, R. 99. To this add, that the owner, by the general maritime law of Europe, might discharge himself from all personal liability, even from *torts*, by abandoning the ship and freight. *The Rebecca* (Ware, R. 195, 678). There is not the least reason to suppose, that it created any liability of the master or owner. *The Rebecca* (1 Ware, R. 195). It was, therefore, a charge imposed on the vessel, and the vessel only, as her share of the common calamity. In this case, by the English law, the owner of the *Ritchie* has a claim, first, on the master, for he is liable for the negligence of the officers and crew. Curtis's Mer. Sea. 204, 205, and cases. Second, on the owner. *The Dundee* (1 Hagg. 113). Third, the marine law gives him a lien on the vessel as a security for the damages.

It is manifestly only as a security, that he has this lien ; it is subsidiary to his claim against the master and owners, and it is precisely like the mariners' lien. 2 Dod. R. 85 ; Valin, b. 3, tit. 7, art. 11 ; Code de Com. art. 407. This distinction has several important applications. Suppose the owner to be in England, and the ship to be elsewhere, and he is sued and pays, could he recover ? What ground of claim would there be against the underwriters ? He, as owner, has been held responsible for damages done to a foreign ship, on account of the negligence of his servants. It is clear, that this would afford no pretence of claim. Can it vary the case, that in the owners' absence the vessel is arrested ? Certainly not ; for this would leave the liability of the underwriters to caprice or accident.

We now come to the most important question : Was this loss imposed on the vessel in consequence of a peril insured

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against? The loss is for damages occasioned by the *tort* of the servant of the assured. This is manifestly so; for if there had been no *tort*, the vessel would not be liable. It is no answer to say, that the underwriters are liable for a loss occasioned by a peril of the sea, the negligence of the master being the remote cause. In the case of *The Paragon*, the peril of the sea was the immediate cause of the loss; but in the present case, the *tort* is the immediate and efficient cause. If a peril of the sea injures the vessel insured, it is no answer to say, that the peril was caused by negligence; for the peril is the cause. If a peril of the sea injures a vessel not insured, and the law, in consequence of the peril, imposes a part of that loss on the vessel insured, the peril is the cause of the loss. But if a peril of the sea injures another vessel, and the law imposes the loss on the assured, solely in consequence of the negligence of his servants, which negligence turns the disaster into a wrong, it is the negligence which is the sole cause of the loss. As long as it is a mere peril of the sea, the injured vessel recovers nothing. It is only by showing it to be a *tort*, that a recovery can be had; and no loss has ever fallen on the owners, or on the vessel, except by payment in their own wrong.

The owners are not bound to indemnify the master. They had a mere lien on the vessel, which has been discharged by the master. As to the question of general average, there is no evidence of the damage actually done to the *Ritchie*. Again; there is, in the answer, no denial of the fact, that the master was guilty of negligence. Indeed, there is *prima facie* evidence of negligence on his part; for the vessel was going before the wind when she came in collision with the vessel on the wind. Besides, the insured is not entitled to an indemnity for money paid as damages, for an injury occasioned by a peril not insured against. 3 Maule & Selw. 318; *Goodsell v. Boldero* (9 East, 72).

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Loring, in reply. — If the authorities cited, establish the point, that insurers are not liable for damage by collision, owing to negligence, then the modern differs from the ancient law in this respect.

No such consequence as is supposed, would follow, if both vessels were insured by the same person, *i. e.* that the insurer would pay a double loss.

He is liable only to *indemnify* the owner. So far as he is indemnified by claims against another, his claim is satisfied; or if the insurer pays the loss, he thereby becomes substituted as to the claim for damages. See 2 Phillips Ins. 128; *Good-sall v. Boldero* (9 East 72).

It is said, that if the collision had been without fault, the owners of the *Ritchie* would have had no claim on the *Columbia*, and there would have been none on the insurers of the latter, and therefore, this claim owes its existence to there being negligence on the part of the *Columbia*.

The objection to this argument is, that it goes behind the immediate cause, the collision, to find the remote cause.

There would be no difficulty in maintaining the claim, if the owners of the *Columbia* had been sued *in personam*, and paid the loss on a judgment against them.

The liability of the vessel existed, and it cannot be material in what manner it was discharged.

STORY J. This is an appeal from a decree of the District Court, sitting in Admiralty, upon a libel brought upon a policy of insurance. Nearly twenty-seven years have elapsed since in the case of *DeLovio v. Boit* (2 Gallis. R. 398), I had occasion to consider and to affirm the jurisdiction of the District Courts of the United States, as Courts of Admiralty, over policies of insurance. I have not unfrequently been called upon in the intermediate period to reëxamine the same subject, and I wish now only to state, that I deliberately

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adhere to the doctrine therein stated. Indeed, in the various discussions, which have since taken place, here, and elsewhere, I have found nothing to retract, and nothing to qualify, in that opinion, in respect to the true nature and extent of that jurisdiction, and its importance to the commercial and maritime world. To no nation is it of more importance and value, to have it preserved in its full vigor and activity, than to America, as one of the best protections of its maritime interests and enterprises. I rejoice to find, also, that, by a recent act of Parliament, the Admiralty in England has been restored to many of the powers and privileges, and much of the jurisdiction, which it anciently maintained, and which has been studiously withdrawn from it for the two last centuries by the ill-considered prohibitions of the common law.¹

It was my hope and expectation, many years ago, that the jurisdiction of the Admiralty over policies of insurance, would have been finally settled in the Supreme Court of the United States, in a cause from this Circuit then pending before it. But the cause went off without any decision. But I have reason to believe that, at that time, my learned brothers, Mr. Chief Justice Marshall and Mr. Justice Washington, were prepared to maintain the jurisdiction. What the opinion of the other judges then was, I do not know; but I have no reason to believe, that a majority of them were opposed to the jurisdiction. Since that period, I have often expressed a determination, whenever any cause of sufficient magnitude to be carried to the Supreme Court, by appeal, should arise in this Circuit, not to act upon the merits of it, until the question of the jurisdiction of the Court over policies of insurance should be settled in the highest Court. The sum in controversy, in the present case, falls below that necessary to maintain the appellate jurisdiction; and, therefore, it is my

¹ See Stat. 3 & 4 Vict. ch. 65; 3 Hagg. Adm. R. (Appen. p. 436 n.)

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duty to decide the questions involved in it upon their own merits.

The cause has been very ably and ingeniously argued ; and turns upon some niceties, which have not as yet come into direct and positive judgment in any former case. The first point naturally presented is ; When and under what circumstances, a collision between two ships on the high seas is to be deemed a peril of the seas ? And I take it to be now clearly established, that a collision is, in all cases, deemed a peril of the seas, within the words of a policy of insurance, not only when it has resulted from accident,¹ but also when it has been occasioned by the fault or negligence of either ship, or of both of them. The case of *Smith v. Scott* (4 Taunt. R. 126), is directly in point, that where the loss has happened to the vessel insured by a collision, arising from the fault or negligence of the other vessel, not the subject of the insurance, it is a loss for which the underwriters are liable. The other point was formerly a question of more difficulty ; but since the cases of *Bush v. The Royal Insur. Co.* (2 Barn. & Ald. 73) ; *Walker v. Maitland* (5 Barn. & Ald. 171) ; *Bishop v. Pentland* (7 Barn. & Cres. 219) ; *Shore v. Bentall* (7 Barn. & Cres. 798, note (b)) ; *Sadler v. Dixon* (8 Mees. & Welsb. 895) ; *The Columbia Insur. Co.* (10 Peters, 507) ; and *Waters v. The Merchants Louisville Insur. Co.* (11 Peters R. 213), it must be deemed at rest in England and in the Courts of the United States. In these cases, it was held, that where a loss occurs from a peril insured against, there it is a loss to be borne by the underwriters, although it may have been occasioned by the negligence of the master and crew. And this doctrine not only stands upon the maxim, *Causa proxima, non remota spectatur* ;

¹ See *Buller v. Fisher* (3 Esp. R. 67) ; 2 Phillips' Insur. ch. 13, § 8, p. 635, 2d edit.) ; *Peters v. The Warren Insurance Company* (14 Peter's R. 99).

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but upon the more general ground, that the underwriters take upon themselves all losses by the perils insured against, without any reference to the fact, whether they are attributable to the negligence or default of the master and crew, or to mere accident or irresistible force. There being no such exception in the words of the policy, the policy of the law does not create one; as the owner can, in most cases, be in no better a condition to guard himself against a loss by the negligence of his agents, than he is to guard against a loss by accident or irresistible force. He does not warrant the fidelity of his agents, but merely their capacity and ability.

The case of *Peters v. The Warren Insurance Company* (14 Peters, R. 99), completely covers the third case, where there is a mutual loss to both ships by a collision, which is properly chargeable and apportionable on both *in rem*, whether that loss be by accident or by mutual fault.

A different rule may prevail, and indeed seems to prevail, in the French law, making the underwriters liable for losses by collision occasioned by accident, or the fault of the other party; but not for losses occasioned by the fault of the assured or his agents. Pothier, and his excellent commentator, Estrangin, and Valin and Emerigon, hold this doctrine.¹ But it has not received any sanction in our law; and, after all, as it stands upon mere general reasoning, it is open to some question, both as to its policy and practical convenience. It is sufficient, however, to say, that in a case of difference between us and foreign writers as to the interpretation of the true rules of commercial law, we must follow our own decisions and doctrines, in preference to theirs.

¹ Pothier, *Traite des Assur.* 2, 49, and n. 50; Estrangin's notes, *ibid*;
1 Emer. *Assur.* ch. 12, s. 14; p. 411; *Ib.* p. 414, 417, 418, edit. 1783;
2 Valin, *Com. b.* 3, tit. 7, art. 10, p. 177; *Id.* art. 11, p. 183; *Code de Comm.* art. 350, art. 407.

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But an attempt has been made to distinguish the present case from the foregoing, upon various grounds ; first, that the loss is primarily a personal charge upon the master, who committed the fault ; secondly, that it is a charge personally upon the owner ; thirdly, that the ship is liable only as a collateral security for the damages. It is hence inferred, that as the charge was not actually fixed upon the ship by any decree, but was paid by the master on the owner's personal account, the loss is not a loss on the ship insured ; but a mere personal loss of the owner, which the underwriters are not bound to compensate.

Now, I agree, that where the loss by collision arises from the negligence of the master and crew, the master is personally responsible for the damages, and the owner is also personally responsible. But it is by no means true, that the ship is, therefore, to be treated only as secondarily liable for the loss, in aid of, or as security for, the master and owner. On the contrary, as I understand it, the ancient law of the Admiralty holds the ship to be the offending or guilty party, and, therefore, primarily, although not exclusively, liable for the compensation. The judgment of Lord Stowell in the case of *The Dundee* (1 Hagg. Adm. R. 109, 120, 122), recognizes this doctrine, if it does not proceed upon it as its true foundation. Indeed, the common course in the Admiralty is to proceed against the ship *in rem* for the damage, whenever she can be reached ; and this is not only a proper course, but in many cases almost indispensable, as the owner is now by statute not liable ordinarily for damages beyond the value of the vessel and her appurtenances and freight, which must be first ascertained and established.¹ Indeed, the argument admits, that by the general (perhaps not the universal) maritime

¹ See Stat. 53, Geo. III. ch. 159 ; *The Dundee* (1 Hagg. Adm. 109, 118) ; *The Richmond* (3 Hagg. Adm. R. 431).

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law of the continent of Europe, the owner may escape all personal liability by abandoning the guilty ship and freight to the injured party. This of itself would seem to show, independently of any statute provisions, that the liability for losses by collision is primarily understood to be a charge on the ship itself, and that so far from the ship being a mere collateral security for the damages, in aid of the personal responsibility of the owner, he is to be deemed, under the present British law, as well as the maritime law of the Continent, as rather a collateral security for the guilty ship, to the amount of her value and the value of the freight, and, at most, personally responsible only when they are not forthcoming to the amount of their value.

The citations from the Digest prove nothing more than the responsibility of the offending mariners for the loss, which I suppose to be undeniable. *Si navis tua impacta in meam scapham, damnum mihi debet, &c.; si in potestate nautarum fuit, ne accideret, et culpa eorum factum sit, lege Aquilia cum nautis agendum.*¹ And again; *Si navis alteram contra se venientem obruisset, aut in gubernatorem, aut ducatorem, actionem competere damni injuriæ. Sed si tanta vis navi facta sit, quæ temporari non potuit, nullam in dominum dandam actionem; sin autem culpa nautarum id factum sit, puto* (says Ulpian) *Aquiliæ sufficere.*² But this personal responsibility does not, at least in modern times, exclude, or supersede, or qualify the right to proceed *in rem* against the offending ship. My learned friend, Judge Ware, of the District Court of Maine, in his able opinion in the case of *The Rebecca* (Ware's Rep. 188), has fully expounded this doctrine, and traced it up to its fountain head.

But it does not strike me, that it is at all material in the

¹ Dig. lib. 9, tit. 2, l. 29, § 2.

² Dig. lib. 9, tit. 1, l. 29, § 4.

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present case to establish, whether the ship or the owner is primarily liable for the loss sustained by the Ritchie, or whether they were each liable *pari passu*, and *in solido*. Suppose the ship had been actually arrested under the Admiralty process in England, (as clearly she might have been),¹ and the master had made the compromise, (which is not denied to have been fairly and reasonably made), or suppose a decree had passed against the ship, and the master had paid the money to deliver the ship from a sale, or to discharge the lien; there cannot, as I think, be the slightest doubt, that the underwriters would have been liable for the charges; for the master would be an agent acting for all concerned under such circumstances. At least, if there be any doubt on this point in any mind, I do not partake of it; and I deem the case of *Peters v. The Warren Insur. Co.* (14 Peters, R. 99), a direct authority in favor of it. What possible difference can it make in law, if the charge is a fixed lien *in rem*, and properly chargeable on the ship, that it has been paid without any legal process or proceedings? If the master pays for a salvage service to the ship without process, is it less a charge on the underwriters, than if it had been adjudged under a decree in the Admiralty? If a ransom is paid to enemies or pirates by the master *bonâ fide* out of property on board, or other funds, to deliver the ship from their possession and power, can there be a doubt, that it is a loss to be borne by the underwriters, without any inquiry, whether there be or be not a right, primary or secondary, to proceed *in rem* or *in personam* by those, whose money or goods have been applied or sacrificed, against the ship or the owner, for contribution? In truth, however, the loss by collision must be treated as a loss, giving an immediate title and

¹ See *The Christiana* (2 Hagg. Adm. R. 183); *The Johann Friedrich* (Robin, New Adm. R. 35).

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remedy to the persons or property injured, from the time of the injury ; and whether the amount be paid by the proceeds of the ship, or by the owner personally, it is still a loss occurring to the owner from the peril insured against, for which the underwriters are responsible to him.

And this leads me to add, that, in my judgment, it makes no difference, whether the ship was liable at all for the loss, if the loss was a peril insured against, and the owner was compellable to pay the loss, as happening by and in consequence of the peril. Unless the collision had taken place, the owner would have incurred no responsibility for any damages. It did take place, and he became chargeable therefore, and it was a peril insured against ; how then can he say, that it was not a loss directly occasioned by and attaching to the peril ? The case of *Peters v. The Warren Insurance Co.* (14 Peters, R. 99) shows, that the collision was the proximate cause of the loss ; and if the owner was thereby compellable to pay it, as well as the ship, the payment must be deemed an immediate charge on him, occasioned by the collision, just as much as upon the ship. The argument seems to suppose, that the insurance attaches only to the extent of the direct injury sustained by the very thing insured. But that argument is not well founded. Any and every expense, borne by and chargeable upon the owner of the thing insured, as a direct and immediate consequence of a peril insured against, is covered by the policy. There are many expenses incurred by the owner, in consequence of a peril insured against, which constitute no charge *in rem* ; and yet the underwriters are bound to pay the same. Take, for example, the fees of proctors and counsel, and officers of the Court, paid under judicial proceedings in cases of capture ; or the fees of notaries in making a protest ; or the costs of a survey ; or the duties and expenses, and charges paid in a port of necessity ; or the expenses and charges of a sale of damaged goods, or

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of a sale of other goods, to enable the master to repair damage by a peril of the seas. These are all incidents to the original peril or loss ; and they must be borne by the underwriters, although they constitute, strictly speaking, no lien *in rem*.

The truth is, that in all these and the like cases, we look to the origin of the loss. If it be a peril insured against, all the incidents attached thereto by law, as necessary or natural incidents, become a part of the loss ; just as much as the storage of goods saved from a shipwreck is deemed a part of the loss ; and the expenses of Court, in a suit to ascertain the salvage, are also deemed a part of the loss.

Upon the whole, I see nothing to take the case out of the general rule fixed by the cases of *Waters v. The Columbia Insur. Co.* (10 Peters, R. 507), and *Peters v. The Warren Insur. Co.* (14 Peters, R. 99). The money, paid to the owners of the Ritchie, was a part of the loss occasioned to the owner of the Columbia by the collision, and a direct consequence thereof. I shall, therefore, affirm the decree of the District Court.

ELIAS HOWE v. EBENEZER E. ABBOTT.

THE application of an old process to produce a new result, is not a patentable invention ; there must be, also, some new process or mode. But the production of an old result by a new process is patentable.

Where a patent was taken out for a combination and an entire process ; *It was held*, that the use of a part of the process and combination was not an infringement thereof.

CASE for the Infringement of a Patent. The suit was brought on a patent granted on the 18th day of March, 1841, to the plaintiff, Elias Howe, assignee of Joseph C. Smith (the asserted original inventor). The invention was described in the letters patent, to be "a new and useful improvement in

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the application of a material called palm leaf, or brub grass, to the stuffing of beds, mattresses, sofas, cushions, and all other uses for which hair, feathers, moss, or other soft and elastic substances are used." The letters patent stated, that the invention was originally secured by letters patent, dated on the 3d of March, 1833, to Joseph C. Smith, and that these latter letters patent had been cancelled on account of a defective specification, and the present letters granted to Howe, as his assignee, upon such cancellation. The breach alleged was an unlawful making and using of the invention.

The defendant pleaded the general issue, with notice of special matters of defence.

The specification annexed to the letters patent was as follows :

"To enable others skilled in the art to which this appertains to make and use my invention, I shall now proceed to describe the method of preparing or manufacturing the same.

"The first operation is to reduce the palm leaf, or brub grass, to filaments or fibres, sufficiently fine to be spun, which filaments or fibres I then spin, and form into a rope ; which should be twisted as hard as possible, so as to kink, or cause the rope to form in balls or coils. This spinning and twisting should be done upon machines similar to those used for spinning and twisting hemp. After the aforesaid process of twisting is completed, the coils, balls, or twisted hanks, should be placed in a steam, or any other kind of oven, where they should be baked to such a degree, as to permanently fix the curl or twist in the fibres or filaments. When this effect is properly produced, the coils should be untwisted ; which operation may be effected by a reverse motion of the same machinery by which it is twisted.

"After passing through these several preparative processes, the fibres of palm leaf or brub grass are left in a light, and

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durably elastic, and curly state, and are suitable for stuffing any of the various articles herein above enumerated.

“ I shall claim as my invention the process of preparing or durably curling palm leaf, or brub grass, by reducing the leaf to small filaments, or fibres, and likewise spinning, baking or steaming, and untwisting the same ; the whole operation being substantially as herein above described, and for the purpose above specified.

Witnesses :	}	ELIAS HOWE.”
R. H. EDDY,		
EZRA LINCOLN, JR.		

At the trial it appeared in evidence, that the mode stated in the specification for spinning and curling the palm leaf, after it was reduced to filaments or fibres, was precisely the same process, by the same machinery, as had long before been, and now was used to spin, and twist, and curl, hair stuffing for beds, mattresses, sofas, cushions, &c. But it did not appear, that the palm leaf was ever actually spun or curled in this way, for the purpose of stuffing beds, &c., until about the time when the original patent to Smith was granted.

There was also evidence to show, that, in point of fact, Smith did not invent the application. But that, a short time before the original patent was granted, Smith carried some of the palm leaf, cut into strips and filaments, to the shop of one Jonathan D. Bosson, a manufacturer of curled hair for beds, &c., in Roxbury ; and Bosson showed him, how it might be spun and curled for beds, &c., and actually did spin and curl some of it in Smith's presence by his own hair machinery ; and that Smith immediately returned home, put the same process in operation, and obtained his original patent. Smith (who was examined as a witness for the defendant) admitted, that he had carried the palm leaf to Bosson's shop ; but he denied, that Bosson told him, how to spin and curl it, or that he spun or

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curled it, on his machinery, as Bosson had stated. There was other evidence to show, that long before Smith's supposed invention, and at least ten or twelve years ago, the same process had been applied by other manufacturers of curled hair to other grasses and vegetable substances, viz., to Manilla grass, to common sedge, to Sisal grass, and to a substance called coir, of which sofas are made.

It was also proved, that the defendant did not bake or steam his palm leaf, after it was stripped, and spun, and curled; but stopped his process with the mere spinning and twisting. All the witnesses concurred in opinion, that the process was far more sure and perfect, so far as the curling was concerned, by baking or steaming the palm leaf after it was spun; and they thought it so essential, that the defendant's process would be defective in attaining the object, and that the curls would not be permanent without it.

B. R. Curtis, for the defendant, insisted, (1), That the patent was not valid, because it was not for any new process, but merely for preparing palm leaf, to produce certain results by an old method. (2), That the patent, according to the specification, was for a combination and an entire process; and that the defendant did not use the whole combination or entire process, but a part only, which was well known and in use before.

H. Fuller and Russell, for the plaintiff, contended, *a contra*, that the objections were not well taken.

STORY, J. — I shall not interfere to stop the cause from going to the jury. But it strikes me, that both of the objections are well founded. In the first place, it is admitted on all sides, that there is no novelty in the process, by which the stripping, or twisting, or curling, the palm leaf, is accomplished. The

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same process of twisting, and curling, and baking, and steaming, has been long known and used in respect to hair used for beds, mattresses, sofas, and cushions. It is, therefore, the mere application of an old process and old machinery to a new use. It is precisely the same, as if a coffee mill were now, for the first time, used to grind corn. The application of an old process to manufacture an article, to which it had never before been applied, is not a patentable invention. There must be some new process, or some new machinery used, to produce the result. If the old spinning machine to spin flax were now first applied to spin cotton, no man could hold a new patent to spin cotton in that mode ; much less the right to spin cotton in all modes, although he had invented none. As, therefore, Smith has invented no new process or machinery ; but has only applied to palm leaf the old process, and the old machinery used to curl hair, it does not strike me, that the patent is maintainable. He, who produces an old result by a new mode or process, is entitled to a patent for that mode or process. But he cannot have a patent for a result merely, without using some new mode or process to produce it.

The other objection strikes me, upon the evidence, which is not controverted, to be equally fatal. The specification in the summing up is manifestly for the entire process or combination, and not for the several parts thereof. Now, the defendant does not use the entire process or combination, but a part thereof only, which certainly, therefore, is not a violation of the thing patented, which is the entire combination. Besides ; the parts used were well known before ; and, indeed, the entire process was well known before, as the evidence clearly shows. It may be, and it strikes me, that the defendant's process is, probably, far less perfect in accomplishing its purposes, than that used by the plaintiff. But that constitutes no ground for a recovery. The question is not,

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which is best, or is most perfect ; but whether the one mode or combination is an infringement of the rights secured by the other mode or combination.

There are other difficulties upon the evidence ; but I venture to suggest, that unless these objections can be overcome, or the evidence controlled, they seem to be fatal.

MEM. — The plaintiff, upon these suggestions, consented to have a verdict taken for the defendant, with liberty to move for a new trial, if he should, upon further examination, think that he could change the posture of the case.

Verdict for defendant, accordingly.

PHINEAS SPRAGUE AND OTHERS, LIBELLANTS, v. ONE HUNDRED AND FORTY BARRELS OF FLOUR, ETC. OF THE CARGO OF THE SCHOONER MARIA, THE MUTUAL SAFETY INSURANCE COMPANY OF NEW YORK, CLAIMANTS.

THE general rule in the Admiralty, in cases of derelict, is to allow one moiety of the property saved to the salvors ; but this allowance may be enlarged by the circumstances of a particular case, where the services performed are of an extraordinary nature.

Under the circumstances of the present case, one moiety of the gross proceeds of the value of the property was decreed to the salvors, with full costs and expenses ; the latter to be a charge exclusively upon the other moiety.

THIS was a libel for salvage of certain goods, and was certified to this Court, from the District Court, under the Act of 3d of March, 1821, ch. 189, on account of the District Judge being related to the libellants. The libel set forth, in substance, that on the 9th of April, 1842, the master and crew of the brig *Cambrian*, of Boston, discovered a wreck, which

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they boarded, and discovered, that it was the hull of the schooner Maria, of New York, and found, that the said hull, and the cargo on board thereof, were entirely direlict, and without any person on board, and nearly full of water. That the said master and crew attempted to take out the goods, wares, and merchandise, laden in the said schooner, and to convey them on board the said brig Cambrian, but the weather was so tempestuous, and the sea so rough, that they were not able to take out more of the said goods, wares, and merchandise, than one hundred and forty barrels of flour, two chain cables, one small anchor, two stoves, and one hard-wood table, all of which they brought to the port of Boston. That the said master and crew, and owners of the said brig Cambrian, by reason of the great risk and hazard they ran, and the service they performed in saving the said portion of the said cargo, deserve, and are justly entitled to receive meet and competent salvage for such service, together with all charges and expenses attending the same.

The Mutual Safety Insurance Company, of New York, intervening for their interest in the cargo of the Maria, appeared and claimed the goods, wares and merchandise, above mentioned, as their property. They admitted the facts, as set forth in the libel, and prayed the Court, after awarding to the libellants meet and competent salvage, to decree restitution of the said property to the claimants.

The cause came on for argument upon the libel and answer, no evidence having been taken by either party, and no matter of fact being in controversy; and it was argued by *Wm. Gray* for the libellants, and by *F. C. Loring* for the claimants.

The following cases were cited for the libellants. *Rowe v. The Brig* — (1 Mason R. 372); *Cross v. The Ship Bellona* (Bee's Adm. R. 193); *The Priscilla* (Bee's Adm. R. 1); *Taylor v. The Friendship* (Bee's Adm. R. 175); *Bass v. Five*

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Negroes and a Canoe (Bee's Adm. R. 201); *Jesby v. One Hundred and Ninety-four Slaves* (Bee's Adm. R. 226); *The Fortuna* (4 Rob. R. 193); *The Frances Mary* (2 Hagg. Adm. R. 89); *L'Esperance* (1 Dods. R. 46); *The Blendenhall* (1 Dods. R. 414); *Hand v. The Elvira* (Gilpin's R. 60); *The Elizabeth & Jane* (Ware's R. 35); *The Rising Sun* (Ware's R. 378); *The Ship Henry Ewbank* (1 Sumner R. 411); *The Britannia* (3 Hagg. Adm. R. 153); *The Aquila* (1 Rob. R. 42); *The Jonge Bastiaan* (5 Rob. R. 322).

STORY J. This is a clear case of derelict, and is admitted on all sides to be so. The general rule in the Admiralty, under such circumstances, is to allow a moiety of the property saved to the salvors. It is not, however, an inflexible rule, but it will yield to circumstances; as, for example, where the property is very large, and no extraordinary perils or labors have been encountered, the allowance has sometimes been less. On the other hand, where the property has been small, the salvors numerous, and the perils imminent, or the services laborious and exhausting, a larger allowance has been thought justifiable. But unless under some peculiar circumstances of this sort, the general rule is silently permitted to have its sway. The case of *The Blendenhall* (1 Dodson R. 414), illustrates the former position; although it strikes me, that the salvage awarded was there too low, under all the circumstances. The case of *The Fortuna* (4 Rob. R. 193); *The Marquis of Huntley* (3 Hagg. Adm. R. 248, 249); and *The Charlotte* (2 Hagg. Adm. R. 361), are to the same effect. On the other hand, there are cases, in which more than a moiety has been decreed to the salvors, under circumstances such as have been already alluded to.¹ But the decisions all

¹ See *The William Hamilton* (3 Hagg. R. 168, and Id. note a); *The Reliance* (2 Hagg. Adm. R. 90, note); *The Jonge Bastiaan* (5 Rob. R. 322).

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show, that it is with great reluctance, that Courts of Admiralty award more than a moiety. *The Frances Mary* (2 Hagg. Adm. R. 89); *The Britannia* (3 Hagg. Adm. R. 153, 154); *The Effort* (3 Hagg. R. 165, 167); *The Ewell Grove* (3 Hagg. Adm. R. 209, 221); *The Queen Mab* (3 Hagg. Adm. R. 242). As long ago as in the case of *Rowe v. An Unknown Brig* (1 Mason R. 372), I had occasion to express my own opinions upon the subject; and I can perceive no reasons now to recede from what was then said.

The gross amount of all the property, saved in the present case, is about six hundred and ninety-six dollars. Of this, articles to the value of one hundred and nineteen dollars are unclaimed; the residue, the flour now claimed, sold for the gross amount of five hundred and seventy-seven dollars; the number of the salvors is twenty-two. The service was plainly a meritorious one; but not under circumstances of extraordinary peril or difficulty. No objection is made, nor, indeed, in my judgment, could reasonably be made, against the allowance of the moiety of the proceeds. The libellants, however, insist, that they are entitled to a higher remuneration, and ask three fifths.

In the present case, I cannot say, that I see sufficient grounds to deviate from the general rule of a moiety; and I should be loth to do so, unless under pressing circumstances, since it might otherwise produce litigation in every case of derelict. I shall, therefore, decree one moiety of the gross proceeds of the value of the property to the libellants, with their full costs and expenses; the costs and expenses to be a charge exclusively upon the other moiety. This is not an unusual course in cases of this sort; and it will in effect not essentially vary from a decree for three fifths of the net proceeds.

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THE Judicial Act of 1789, ch. 20, § 30, does not peremptorily ordain, that the testimony of witnesses, living more than a hundred miles from the place of trial, shall be taken by deposition; but it only permits such a course; and if such witnesses be present in Court at the trial, and give their testimony orally, the full cost of their travel and attendance should be allowed in the costs.

By the Statute of 1 Will. IV. ch. 22, giving authority to English Courts of Law to issue commissions for the examination of witnesses abroad, the Court may, in its discretion, allow the expenses of the witnesses, or the costs of the commission.

Postage paid on a commission should be allowed as a part of the costs thereof.

CASE for Infringement of a Patent for an Improvement in the manufacture of Ploughs. The cause was argued at a former term of the Court, upon the general issue, and a verdict was found for the defendants. A Bill of Exceptions to the opinion of the Court was filed at the trial; and a writ of Error was taken by the plaintiffs to the Supreme Court upon the exceptions, and the judgment rendered in favor of the defendants; and at the last January Term of the Court the judgment for the defendants was affirmed. (See 16 Peters R. 336).

A question upon the return of a mandate of the Supreme Court was now made as to the taxation of costs, which was shortly argued by *Dexter* and *Phillips* for the defendants, and by *Gray* and *Morton* for the original plaintiffs.

STORY J. — There does not appear to me to be any real difficulty as to the taxation of costs in this case. The first objection, taken by the plaintiffs, is to taxing the costs of witnesses, who personally attended at the trial, for their personal travel and attendance, they being more than one hundred miles from the place of trial. By the Judicial Act of 1789, ch. 20, § 30, their depositions might, under such circum-

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stances, have been taken, and used at the trial. The objection is, that their personal attendance might have been dispensed with, and, therefore, that their travel and attendance ought not to be taxed in the costs. My opinion is, that the objection is not maintainable. The Act is not peremptory, that under such circumstances the depositions of the witnesses shall be taken and used, but only, that they may be taken and used. It is, therefore, a mere option given to the party, who wishes to use the testimony of the witnesses. In many cases, the presence of the witnesses in person, and their oral testimony on the stand, may be indispensable to the true exposition of the merits of the case. No deposition would, or could, meet all the exigences, which might arise from the varying character of the evidence, or the necessity of instant explanation of circumstances, not previously known or understood. The character of the case, too, may be so dependent upon scientific principles, or on a minute description of mechanism, as to be almost impracticable to be presented to a jury, except by the aid of oral testimony, illustrating the principles of mechanism. In no class of cases is this more forcibly felt, than in the trial of cases like the present, for infringement of patent rights.

There is no pretence in the present case, that the witnesses were brought here for purposes of oppression, or without necessity, for the purpose of swelling the costs of the litigation. In my judgment, therefore, there is no ground to say, that the full costs of the personal travel and attendance of the witnesses ought not to be allowed in the costs. Unless my memory deceives me, the same question has been presented to this Court in several instances before the present, and it has uniformly received the same determination. There are numerous cases in the English reports, in which allowances have been made for the travel and attendance of witnesses, who have come from foreign countries, for the purposes of the

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trial; and yet we all know, that in such cases, through the instrumentality of a Court of Equity, (and now in many cases of a Court of Law), the testimony of such witnesses might be obtained upon a commission. *Moore v. Adams* (5 Maule & Selw. 156); *Tremain v. Barrett* (6 Taunt. R. 88); *Sturdy v. Andrews* (4 Taunt. R. 697); *Cotton v. Witt* (4 Taunt. R. 55); and *Loneragan v. Royal Exch. Assur. Cy.* (7 Bing. R. 725, 729).¹ Indeed, since the Statute of 1 Will. IV. ch. 22, giving authority to the Courts of Law, to issue commissions to take the examinations of witnesses abroad, it is still a mere matter of discretion with the Court, if the witnesses are actually brought from abroad, whether they will allow the expenses of the witnesses, or only the costs of a commission.² This seems to be putting the whole doctrine upon a sound and rational foundation; and enables the Courts at once to accomplish the purposes of justice, and to prevent the accumulation of unnecessary or extravagant expenses.

The rule adopted by the Supreme Court of Massachusetts, in *Melvin v. Whiting* (13 Pick. 184, 190), is manifestly a new one, then promulgated for the first time.³ It can have no authority whatsoever here, it being a mere matter of State practice, as the Courts of the United States have complete authority to adopt such practice for themselves, as they deem most convenient and proper. I confess myself not satisfied, that the State rule thus promulgated, is one, which has a very satisfactory foundation in principle, or public convenience, or general justice. At all events, this Court has long held and acted upon a different doctrine; and I can perceive no just

¹ See also 2 Tidd, Pract. p. 814, 9th edit. 1828; Tidd's New Pract. p. 494, edit. 1837; *Bridges v. Fisher* (1 Bing. New Cas. 510).

² *McAlpine v. Powles* (1 Crompt. & Mees. 795); Tidd's New Pract. p. 494, edit. 1837.

³ *White v. Judd* (1 Metcalf, R. 293), affirms the same Rule as to the travel and attendance of parties in suits.

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reason for changing it. I am, therefore, of opinion, that the objection should be over-ruled.

As to the allowance of postage paid upon the transmission of the Commission to the Commissioners, and upon the return thereof, after it was executed, as a part of the costs, I do not see, how that charge can well be distinguished from the other charges of executing the commission. It is a necessary part of the proceedings and expenses incurred thereby ; and generally the cheapest mode of obtaining the testimony. The case of *Thorndike v. Buffington*, cited by Mr. Phillips, in his Digest, (Costs (g) pl. 7), as having been decided in 1826, in the State Court, is, to be sure, directly in point against the allowance of the charge. But I do not find that case any where reported in the printed reports ; and no reasons are given for the decision. So that we are wholly left to conjecture them. I cannot say, that there appears to me any solid ground for denying such an allowance. The contrary rule may, for aught I know, be entirely in conformity to the settled practice of the State Courts ; and if so, it ought not to be disturbed. But it can furnish no ground to regulate the practice of this Court, unless so far, as it seems adapted to the purposes of general convenience and justice. In either view, I confess myself not satisfied, that it ought to be adopted in this Court

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EVERY public officer is required to perform all duties, which are strictly official, although they may be required by laws passed after he comes into office, and may be cumulative upon his original duties, and although his compensation therefor be wholly inadequate. In such a case, he must look to the bounty of Congress for any additional reward.

Where the collector of Ipswich claimed a commission on drafts drawn by him on the collector at Boston, in payment of bounties due to fishermen, under the Act of 1813, ch. 34 ; *It was held*, that there being no provision,

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by which a commission is allowed thereon, the collector could not charge a commission.

The collector of any port, being authorized by the Act of 1817, ch. 282, § 7, to appoint a deputy, with the approbation of the Secretary of the Treasury ; *it seems*, that a deputy, so appointed, should receive a reasonable compensation for his services, although no compensation therefor be fixed.

All expenditures, made by a collector for office rent, clerk-hire, fuel, and stationary, are to be deemed incidents to his office, and should be allowed as proper charges against the United States ; and if he do not keep and transmit yearly accounts thereof, according to the requisitions of the Act of 1799, ch. 129, § 2, he does not forfeit his right to be reimbursed for such expenditures, but only subjects himself to the payment of the penalty.

Penal Statutes must be strictly construed, and are never extended by implication.

Writ of Error from the judgment of the District Court, of Massachusetts District. The original suit was debt brought upon the official bond of Andrews, formerly Collector of the port and district of Ipswich. The United States claimed a balance due for moneys received by the defendant ; and the pleadings put the question, whether any such balance was due, directly to the jury. There was, also, a claim of set-off, by the defendant, for legal and equitable claims, asserted to be due to him ; all of which were rejected at the trial, by the ruling of the District Judge, to whose decisions on the points raised, a Bill of Exceptions was taken. The jury found a verdict for the United States for the sum of \$1142.27 ; upon which a Writ of Error was brought by the defendant.

The Bill of Exceptions, after reciting the pleadings and issue, proceeded as follows—

Which issue being joined as aforesaid, came on to be tried by a jury, duly empanelled and sworn for that purpose.

The plaintiffs offered, and gave in evidence, a duly authenticated copy of the bond declared on.

The plaintiffs, also, offered and gave in evidence a duly authenticated treasury transcript of the accounts of the said

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Asa Andrews, by which it appeared, that on the twenty-ninth day of July, in the year of our Lord one thousand eight hundred and twenty-nine, there was in the hands of the said Asa Andrews, to the credit of the United States, the sum of nine hundred and twenty-one dollars and ninety-two cents.

The plaintiffs here rested their case.

The defendants then proved, that the said Asa Andrews had, from time to time, during his continuance in the office of collector, as aforesaid, investigated claims for bounties to fishermen under the several laws of the United States, and had paid and disbursed to the said fishermen, in all, the sum of fifty-four thousand seven hundred and ten dollars and eighty-six cents, by drafts upon the collector at Boston, for which service he had received from the United States no compensation beyond the salary of his office, and that his claim for such compensation had been rejected by the treasury department, which rejection was proved. And the defendants prayed his Honor, the Judge, to instruct the jury, that the said Andrews was entitled to a reasonable compensation for this service, which was proved to be the most laborious duty of the said office. But his Honor, the Judge, refused so to instruct the jury, but instructed them, that the said Andrews was not by law entitled to any commission or compensation on the amount received by drafts on the collector at Boston, and applied to the payment of such bounty to fishermen, nor to any compensation for such service, beyond the salary of his office, and the commission on such portion of the amount of bounties paid, as was made from his own collection of duties in his district.

The defendants then offered, and gave in evidence, the several commissions of the said Asa Andrews, as inspector of the revenue of the port of Ipswich, and proved, that the said Andrews performed the duties of the said office during the whole time, that he held the office of collector as afore-

said. The defendants further proved the importation of large quantities of distilled spirits into the port of Ipswich, and that he performed all the duties pertaining to the said office of inspector, in reference to said distilled spirits, and prayed his Honor, the Judge, to instruct the jury, that he was entitled to compensation for his services, so performed, as inspector, in reference to distilled spirits, and to submit to the jury the question, whether he has been paid therefor or not; but his Honor refused so to instruct the jury, but did instruct them, that the said Andrews was not entitled, in point of law, to any compensation for his said services, as inspector, beyond his salary as collector, and the fees, if any, allowed by law for such services.

The defendants then proved, that the said Asa Andrews had, during the whole time of his continuance in office, employed a deputy-collector, duly appointed and commissioned as such deputy, by him, the said Asa Andrews, which deputy acted in his absence, and sometimes, when he was not absent; and as to deputies offered evidence, tending to show, that he had paid the said deputies, and that he had received no compensation or allowance for the said sums, so paid to the said deputies, and that his claim for such compensation or allowance had been rejected by the treasury department.

The defendants further offered, and gave evidence, that the port of Ipswich embraced a long line of sea-coast, and of a character well calculated to afford facilities for defrauding the revenue; and proved by the testimony of several persons, who had been connected with the collection of the customs in the vicinity of the port of Ipswich, and by the late collector of said port of Ipswich, Timothy Souther, Esq., that it is, and has been necessary to the protection of the revenue, that there should be, at least, one subordinate officer in said port of Ipswich.

The defendants also proved, that except at times when

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vessels from foreign ports were in, and were actually discharging, no compensation had been allowed for any subordinate officer. They further proved, that the said deputy-collector had performed the duties of a tide-waiter, or inspector, and that he was the only subordinate officer employed, except while foreign cargoes were discharging.

The defendants requested his Honor, the Judge, to instruct the jury, that the said Asa Andrews was entitled to be allowed such sums of money as he had paid to the said deputies ; but his Honor refused so to instruct the jury, but instructed them, that, in regard to any such deputies, they were entitled only to such fees, as by law were appointed for their services ; and that the collector, having not made any charge for such services contemporaneously, nor at any time, in his quarterly accounts, rendered during his continuance in office, a demand for any discretionary allowance, which the officers of the treasury might make in the premises, could not in this suit be sustained.

The defendants then proved, that the said Asa Andrews had performed the duties of the office of surveyor of the said port of Ipswich, and that he had received no compensation therefor, and that his claim for such compensation had been rejected by the treasury department ; and the said defendants requested his Honor, the Judge, to instruct the jury, that the said Andrews was entitled to compensation for his said services as surveyor of said port ; but his Honor refused so to instruct the jury, and did instruct them, that the said Andrews was not entitled to any compensation for such services, further than his salary as collector, as aforesaid, and the legal fees for any duties at any time performed as surveyor, and that it was now too late to receive and sustain the defendant's demands for such services, which were not contemporaneously made, or introduced in any of his quarterly accounts, during his continuance in the office of collector.

It appears, that the defendants made certain charges of payments, from time to time, and at different periods, to weighers, gaugers, inspectors, &c.; but the defendants proved, that payments to such persons were made only at such times as vessels were in and actually discharging.

The defendants then proved, that the expenditures of the said Asa Andrews for office rent, fuel, stationary, and clerk hire, during the time in which he held the office of collector, as aforesaid, amounted to the sum of fifteen hundred and fifty-five dollars and seventy cents; and that he had presented a yearly account of the said expenditures to the treasury department, and that no part of the same had ever been allowed to him, but that the said claim and every part of it had been disallowed by the said treasury department.

The defendants prayed his Honor to instruct the jury, that the said Andrews was entitled to compensation for the said expenditures of office rent, fuel, clerk hire, and stationary; but his Honor refused so to instruct the jury, but instructed them that the said Andrews was not by law entitled to any allowance for the said expenditures.

The defendants here rested their case, and thereupon the jury returned their verdict for the United States, for the sum of \$1142.27.

The cause was now submitted to the Court without argument by *R. Choate*, for the plaintiff in Error, and by *Dexter* (District Attorney) for the United States.

STORY, J. This cause having been submitted to the Court without argument, I am not sure, that I fully comprehend all the grounds intended to be relied upon by counsel, either in objection to, or in support of, the various claims stated in the Bill of Exceptions. If any of these claims, although not strictly of a legal nature, are yet *ex æquo et bono* due to the defend-

ant for extra services rendered, or moneys expended on account of, and for the benefit of the United States, it is very clear, that the defendant is entitled to an allowance and compensation therefor, upon the footing of a *quantum meruit* under the Act of 1797, ch. 74, § 3. This was fully settled by the Supreme Court in *United States v. Wilkins* (6 Wheat. R. 135, 143, 144), and has been repeatedly recognized in subsequent cases, and especially in the case of *Gratiot v. United States* (15 Peters R. 336, 370, 371). But where duties are required to be performed by a collector or other public officer, strictly official, and falling within the ordinary range thereof, there, although they may be conferred by laws subsequently passed, after he came into office, or may be cumulative upon the original duties of the officer, he must be deemed to take and hold the office *cum onere*; and, however inadequate the compensation may be for his labor and services, he must content himself with the salary and fees allowed by law, and look to the bounty of Congress for any additional reward.

Tried by these tests, let us now proceed to consider the various claims of the defendant, stated in the Bill of Exceptions. The first is for the ascertainment and payment by drafts on the collector at Boston, of the bounties due to fishermen, under the Act of 1813, ch. 34, and other prior repealed acts, and subsequent acts still in force, on the same subject. I do not, from the manner in which the ruling of the District Judge is stated in the exception, precisely understand, whether the learned Judge meant to say, that if these bounties had been paid by the defendant, out of moneys of the United States; from the collection of duties in his district, the commissions would have been allowable for this particular service; but that, having been made by drafts drawn by him upon the collector at Boston, they were not allowable on the accounts of those drafts; or whether the learned Judge meant only to say, that, as by the Act of 1799, ch. 129, § 2, for the

compensation of officers of the customs, three per cent. commissions were allowed to the collector of customs of Ipswich, on all moneys received by him on account of duties on goods imported into his district, and as no other cases were provided for, therefore, no commissions were payable on account of the payment of bounties to fishermen. If the former was intended to be laid down by the learned Judge as law, I should not be prepared to adopt it ; for, in my judgment, a payment by the drafts of the defendant on the collector at Boston, would be just as much a payment to entitle the defendant to the three per cent. commissions, in the sense of the law, as if he had paid the bounties out of any moneys in his own hands, under his official collections. The question, then, would be, whether the three per cent. is provided for by law in either case for the payment of bounties. I have not been able to find any provision for any compensation of this sort, in any act of Congress ; and if there be any, it has escaped my researches. If any exists, I desire to have it pointed out at the bar, before any final judgment is rendered in this case. But if the other be the true construction of the ruling of the learned Judge, then, it seems to me perfectly correct ; because, by the Act of 1813, ch. 34, § 5, as well as by the prior and subsequent acts upon the same subject, it is made a part of the ordinary official duties of the collector of the customs, to ascertain and pay these bounties ; and then (as has been already suggested) he must rely upon the salary and fees annexed by law to the office, unless some additional compensation is allowed for this service, which, in a district like that of Ipswich, as will appear from the facts stated in the record, is one of no small labor and responsibility, compared with the other ordinary duties of the collectorship. In such a case, however, the appeal lies to the bounty of Congress, and not to a judicial tribunal.

The next claim is for the compensation paid to a deputy

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collector, by the defendant. The Act of 1799, ch. 128, § 22, authorized the collector, in cases of occasional land necessary absence, or of sickness, and not otherwise, to exercise and perform their functions by a deputy. The Act of 1817, ch. 282, § 7, authorized collectors, with the approbation of the Secretary of the Treasury, to employ such deputy collectors as they should deem necessary ; and this provision was perpetuated by the Act of 1822, ch. 57, § 4. Another act passed at the same session (Act of 1822, ch. 107, § 15), authorized the Secretary of the Treasury to limit and fix the compensation (among other officers of the customs) of each deputy collector, limiting it not to exceed, except for certain enumerated ports, one thousand dollars per annum, and for those ports, not to exceed fifteen hundred dollars, "for any services he may perform for the United States in any office or capacity." I am not aware of any other act, which expressly provides for a distinct compensation to be paid by the United States to such deputy collectors. Whether the Secretary of the Treasury has ever sanctioned any allowance to any deputy for the port and district of Ipswich, I do not know ; and there is nothing in the record, which leads to any conclusion on the subject. But, if he has sanctioned the appointment of a deputy for that port and district, and the business required it, it would seem reasonable, that some compensation should be paid by the United States for his services. Perhaps the case of such a deputy, if not otherwise compensated, may have been treated as embraced within the general provision in the Act of 1799, ch. 129, § 2, which authorizes the allowance of two dollars a day to every other person, than a regular inspector, whom the collector may find it necessary and expedient to employ as occasional inspector, or in any other way, in aid of the revenue. In the Act of 17th of July, 1838, ch. 169, § 3, a limitation is put upon the allowance of compensation to deputy collectors ; and the like provision occurs in the subsequent Act of the 3d of March, 1841, ch. 16, § 2.

However, as no evidence is contained in the record upon this particular point, it is impracticable for this Court, upon a writ of error, to look beyond the mere ruling of the Court below, upon the point of law ; and the burthen of proof, to establish an error in the ruling, is upon the plaintiff in error.

In the next place, as to the allowance, claimed by the defendant for performing the duties of surveyor ; it appears to me, that he is not entitled to any compensation therefor, upon the principles already stated ; because, by the Act of 1799, ch. 128, § 21, when there is no surveyor assigned by law for a particular port, the collector of the customs is required to perform the duties of a surveyor, as far as may be.

The last objection, and that upon which I have felt the most difficulty, is the ruling of the learned Judge upon the point, that the defendant, Andrews, requested the Judge to instruct the jury, that he was entitled to compensation for office-rent, fuel, clerk-hire and stationary, which he had paid and expended in his office, as collector, of which he had presented a yearly account to the Treasury Department, and no part thereof had been allowed to him ; but, on the contrary, had been disallowed. But the Judge refused so to instruct the jury ; but instructed them, that Andrews was not, by law, entitled to any allowance for the said expenditures.

No particular ground is stated in the record for this instruction given by the learned Judge ; and, therefore, if maintainable at all, it must be upon the general ground, that no allowances are by law to be made for such expenditures ; or, if allowable, that they were not in due and proper season presented to the Treasury Department for allowance. It appears to me very clear, that these expenditures are properly to be deemed incidents to the office of the collector, and, therefore, that they ought to be allowed as proper charges against the United States. The Act of 1799, ch. 129, § 2, manifestly contemplates the allowance of them. It provides, that, "It shall be

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the duty of the respective collectors, &c. to keep accurate accounts of all fees and special emoluments received by them ; also, of all expenditures, particularizing the expenditures for rent, fuel, stationary, and clerk-hire ; and to transmit annually within forty days after the last of December, an account, verified on oath or affirmation, to the comptroller of the Treasury, &c. ; and if any collector, &c. shall omit or neglect to keep an account as aforesaid, or to transmit the same, verified as aforesaid, he shall forfeit and pay, a sum not exceeding five hundred dollars, for the use of the United States."

It does not appear, from the bill of exceptions, whether Andrews did, in fact, keep such an account, or transmit it yearly to the department, as required by law. All that the bill of exceptions states, is, " that he had presented a yearly account of such expenditures, to the Treasury department, and that no part of the same had been allowed to him," &c. Now, it may be, that this language refers only to the final claim made and disallowed at the Treasury department, which is required by the Act of 1797, ch. 74, § 4, to entitle the party to an equitable set-off, in the present suit. If so, that is not such an account as the Act of 1799, ch. 129, § 2, requires. It may be, that it was intended to refer to the keeping and transmission of the accounts, as required by the latter act. The language is somewhat equivocal and uncertain. But construing it most unfavorably for Andrews, and that he did omit or neglect to keep and transmit such yearly account every year, as this latter Act requires, still I think, that he did not forfeit his right to be reimbursed the amount of his expenditures for these purposes ; and, at most, he incurred only the statute penalty, not exceeding five hundred dollars, as an indemnity to the United States, for any loss sustained thereby. Suppose these expenditures for one year had amounted to \$10,000, as in some districts they might, and the accounts were not transmitted until more than forty days had

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elapsed after the last of December of that year: it would hardly be contended, that the whole claim was extinguished. And yet, such must be the result, if we construe the statute, by imposing a penalty, to have extinguished the claim, as soon as the penalty was incurred. I think that, not a natural, or necessary, or reasonable construction of the statute. It is not said, that the claim shall, by the omission or neglect, be forfeited or extinguished; and for the Court so to interpret the statute, would be to enlarge the words, and the intent, and to create penalties beyond what the statute has declared. No rule in the interpretation of penal statutes has ever been carried to such an extent. On the contrary, the general rule universally recognized, is that penal statutes are to be construed strictly. They are never extended by implication. The penalty, itself, is not a fixed penalty. It is not to exceed five hundred dollars. It may be only one dollar.

It appears to me, therefore, that the instruction of the learned Judge is not correct in point of law; and has proceeded upon a ground, which the statute does not justify; and which the principles, established in other cases, as to equitable allowances, disclaim.

My opinion, therefore, is, that the judgment of the District Court must be reversed; and a *venire facias de novo* be awarded for a new trial of the whole cause at the bar of this Court.

Judgment reversed.

GEORGE R. RUSSELL AND OTHERS

v.

TIMOTHY WIGGIN AND OTHERS AND TRUSTEE.

By the law of England, it seems, that a promise to accept a non-existing bill of exchange, even though it be taken by the holder upon the faith of that promise, does not amount to an acceptance of the bill, when drawn

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in favor of the holder. But it has been held otherwise by the Supreme Court of the United States.

A promise contained in a letter of credit, written by persons, who are to become the drawees of bills drawn under it, promising to accept such bills when drawn, which letter is designed to be exhibited for the purpose of inducing persons to advance money on it and take the bills when drawn, is an available contract in favor of the persons, to whom the letter of credit is shown, who advance money and take the bills on the faith thereof.

A. of Boston, the agent of a banking house in London, gave a letter of credit to B. authorizing C. who was about to proceed to the East Indies, to value on the said bankers to a certain amount, engaging, that the bills should be duly honored when presented; B. at the same time made the usual arrangement to remit to the said bankers in London sufficient funds to meet the payment of all bills, which might be drawn by virtue of the said credit; but failed to do so. The said letter of credit was taken to Manilla by C. to procure a cargo, and the plaintiffs, on the strength of the letter, furnished a cargo and received from C. bills on the said bankers to the amount limited in the said letter of credit. Most of the bills so drawn, were paid at maturity; others were protested for non-acceptance and for non-payment, and were returned to Manilla, and paid by the plaintiffs, who were also obliged to pay and did pay more than one re-exchange *It was held:*

1. That the said letter of credit was to be deemed to be made in Massachusetts, and as to its obligation, construction and character, was to be governed by the laws of Massachusetts, and not by the laws of England.
2. That the plaintiffs were entitled to maintain an action against the said bankers and to recover the amount of the damages sustained by the refusal of the defendants to accept the bills.
3. That the plaintiffs were entitled to recover the whole damages, costs, and expenses paid by them, including re-exchange, with interest of the place, where the money was payable by the plaintiffs.

ASSUMPSIT. — The declaration contained a count, upon a promise to accept certain bills of exchange stated therein; and also the money counts.

The cause came before the Court, upon the following agreed state of facts:

On the fourth day of November, 1835, the defendants granted to Ebenezer Breed a letter of credit, of which the following is a copy: "Boston, Nov. 4, 1835. I hereby author-

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ize Mr. William P. Endicott of barque *Palinure* to value on Messrs. T. Wiggin & Co., London, at six months' sight at any place in India, for account of Ebenezer Breed, Esq., of Charlestown, for any sums, not exceeding in all fifteen thousand pounds sterling. And I hereby engage, as the authorized agent of Messrs. T. Wiggin & Co., that the bills of Mr. Endicott shall be duly honored when presented, if drawn within twelve months from the date of this letter. In case of any accident, by which Mr. Endicott may be prevented from using this credit, I hereby authorize Captain Robert Henderson, Jr., of said barque, to use the same for account of Mr. Breed, for £15,000 sterling.

"(Signed) *Robert Hooper, Jr., agent, to T. Wiggin & Co.*"

At the same time, Breed signed and gave to Hooper a contract of which the following is a copy: "Boston, Nov. 4, 1835. Mr. Robert Hooper, Jr., on behalf of Messrs. T. Wiggin & Co., of London, having at this date opened a credit on said T. Wiggin & Co., for my account, to be used in India by William P. Endicott, Capt. Robert Henderson, Jr., of barque "*Palinure*," to the extent of fifteen thousand pounds sterling. In consideration thereof, I hereby agree to remit to T. Wiggin & Co., in London, sufficient funds to meet the payment of all bills, which may be drawn by virtue of this credit, together with all charges on the same. I further agree with said T. Wiggin & Co., to give security here to the satisfaction of their agent, to the amount of fifteen thousand pounds sterling, at any time when required by them or their agent.

(Signed) *Eben. Breed.*"

Letters of credit, so issued, were always accompanied by an engagement on the part of the person for whose account the credit was issued, to remit funds to the banker in London, in season to meet the bills, which should be drawn under the

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credit, unless the merchandize purchased was by the terms of the credit, to be shipped to the banker or his agent : such letters of credit being at that time never based on funds of the party receiving it, actually in the hands of the banker. Afterwards, the said Endicott proceeded in the said vessel to India, and wishing to procure a cargo at Manilla, consigned his vessel to the plaintiffs, then doing business there, exhibited and delivered to them the said letter of credit, and proposed to them to furnish a cargo, and receive bills on the defendants, drawn under the said letter ; — and the plaintiffs, relying on the commercial standing of the defendants, and on their promise contained in said letter, agreed to, and did furnish a cargo for the vessel, and received bills on the defendants to the amount of £15,000, drawn payable in six months after sight, on account thereof. The bills so drawn were payable to the order of the plaintiffs, and were indorsed and negotiated by them as opportunities offered.

Mr. Breed failed in June, 1837, not having performed his contract aforesaid. Most of the bills so drawn, were accepted on presentation, and paid at maturity. One drawn Oct. 29th, 1836, for £373, 3s. 6d., reached London by the way of Spain, was accepted on presentment, April 22d, 1837, was not paid at maturity, was duly protested for non-payment, and returned to Manilla by the same route, where it arrived in July, 1838, and was taken up and paid by the plaintiffs, February 11th, 1839 : — the principal, with reëxchange, damages, and interest, paid by them, amounting to the sum of \$2528.20. One drawn Oct. 29th, 1836, for £273, 10s., reached London by the way of Cadiz, was accepted April 25th, 1837, not paid at maturity, protested for non-payment, and returned to Manilla by same route, where it arrived July, 1838, and was taken up by the plaintiffs, Nov., 1839, who paid the principal, damages, &c., \$1692.93. Two dated Nov. 3d, 1836, one for £436, 15s. 6d., and one for £300, reached London by

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the way of Spain, were presented for acceptance, June 27th, 1837, protested for non-acceptance, and afterwards for non-payment, were returned to Manilla by the same route, where they arrived in June, 1838, and were paid with reëxchange, &c., in July and November, 1839, amount \$4865.77. One dated November 2d, 1837, for £407, 11s., reached London by the way of Spain, and was presented for acceptance and protested for non-acceptance, June 12th, 1837, and for non-payment, December 15th, was returned by the same route, and the plaintiffs paid it, February 20th, 1839, \$2863.67. One dated November 3d, 1836, was presented in London, and protested for non-acceptance, July 4th, 1837, and for non-payment, January 6th, 1838, and was returned to Manilla September 1st, 1838, and paid by the plaintiffs in February, 1839, \$558.34. The plaintiffs resisted payment of more than one reëxchange from London, and a suit was brought in a similar case at Manilla, the decision of which the holders of the bills and the plaintiffs agreed to abide; the decision was in favor of the holders of the bills, and the plaintiffs paid accordingly. The plaintiffs were duly notified of the dishonor of the bills. The defendants admit their liability on the two accepted bills for the face thereof, and the costs of protest and interest at the rate of 5 per cent. per annum; the plaintiffs claim also damages, and reëxchange they were obliged to pay. The defendants deny all liability on the non-accepted bills; the plaintiffs claim the whole amount paid by them on account thereof, with interest, at the rate of — per cent. The bills, protests, a copy of the record of the Spanish case referred to, and the laws of Spain, may be referred to by either party. The trustee admits assets. The parties agree, that the opinions of Sir William Follett, Sir Frederick Pollock, and Mr. M. D. Hill, upon certain questions of law submitted by the defendants' counsel, may be used upon the hearing of this case, in the same manner as if

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taken under a commission duly issued ; but the plaintiffs do not by this consent waive any other objections to such testimony. The legal rate of interest at Manilla is six per cent. The plaintiffs had no actual knowledge of the above contract signed by Breed, nor his business relations with the defendants, except from the letter of credit, and no notice thereof, unless it is implied by law from the course of business. If the Court shall be of opinion, that the plaintiffs are entitled to recover the whole or any part of their claim in this action, judgment shall be rendered accordingly ; otherwise they shall be non-suited, costs to follow the result.

The facts in the case were submitted to eminent lawyers in England, upon the following questions stated :

(1.) By the law of England, do the letter of credit and the acts of the parties above stated create *any contract* between *Russell, Sturgis & Co.* and *T. Wiggin & Co.*, to accept the bills drawn under the letter of credit ?

(2.) By the law of England, could Russell, Sturgis & Co., upon the facts above stated, maintain any action against *T. Wiggin & Co.*, founded on the said letter of credit, and if not, why not ?

(3.) By the law of England, is a promise in writing, to accept a non-existing foreign bill drawn so as to be payable in six months after sight, equivalent to an acceptance, where the payee takes such bill on the faith of the written promise of the drawee to accept it ?

(4.) By the law of England, what damages, if any, would *T. Wiggin & Co.* be liable for to *Russell, Sturgis & Co.*, upon the bills above mentioned, which were accepted by them, and protested for non-payment ?

(5.) By the law of England, what damages, if any, would *T. Wiggin & Co.* be liable for to *Russell, Sturgis & Co.*, upon the bills above mentioned, which were protested for non-acceptance ?

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OPINION OF SIR WILLIAM FOLLETT AND SIR JOHN BAYLEY.

We are of opinion, that the letter of credit and the acts of the parties above stated, do not, by the law of England, create any contract between Russell, Sturgis & Co. and T. Wiggin & Co., to accept the bills drawn under that letter of credit.

We are of opinion, that Russell, Sturgis & Co. could not, by the law of England, upon the facts above stated, maintain any action against T. Wiggin & Co., founded on the said letter of credit, because there is no privity of contract, or consideration moving between them.

We are of opinion, that a promise in writing to accept a non-existing foreign bill, is not, under the circumstances stated, by the law of England, equivalent to an acceptance.

The damages to which T. Wiggin & Co. would be liable to Russell, Sturgis & Co., by the law of England, for non-payment of bills accepted by them, would be the amount of principal, interest and expense of protest on each bill. But T. Wiggin & Co. would not be liable by the law of England to Russell, Sturgis & Co. for any damages upon bills which they did not accept.

W. FOLLETT, } *Temple, 9th*
JOHN BAYLEY, } *April, 1842.*

OPINION OF SIR FREDERIC POLLOCK.

1. I am of opinion, that according to the law of England, no contract was created between Russell, Sturgis & Co. and T. Wiggin & Co., to accept the bills drawn under the letter of credit in consequence of the letter of credit and the acts of the parties.

2. Nor could Russell, Sturgis & Co., upon the facts above stated, maintain any action founded on the letter of credit against T. Wiggin & Co. The reason is, that Russell, Sturgis & Co., are not parties to the contract.

3. According to the law of England, a promise in writing

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to accept a non-existing bill is not equivalent to an acceptance of it. It is merely a contract made by the party promising to the party to whom the promise is made.

4. The damages to be recovered from the drawer and indorsers, in the case of an accepted foreign bill, being dishonored, protested and returned, depend upon the usages of the place where the bill is dishonored, which I believe vary very much, but as against the *acceptor*, nothing is recoverable but the amount of the bill and interest.

5. As to the unaccepted bills, T. Wiggin & Co. would not be liable at all to Russell, Sturgis & Co.

FRED. POLLOCK, *Temple*, 5th April, 1842.

OPINION OF M. D. HILL.

1, 2, & 3. I am of opinion, by the law of England, the letter of credit and the agreement would not constitute an acceptance of non-existent foreign bills of exchange. But this point, I apprehend, must be determined according to the *lex loci contractus*, and I have reason to doubt, whether the law of the United States agrees with ours on this question. If the case of *Coolidge v. Payson* (2 Wheaton's Cases), in the Supreme Court of the United States, be law in this country, the letter of credit operated as an acceptance, according to American law, but that case was decided entirely on the English cases, which are not considered here as authority to the intent required. If, however, the letter of credit and agreement do not amount to acceptance, I see nothing in these documents and the acts of the parties to raise a contract to accept, between Russell, Sturgis & Co. and T. Wiggin & Co., Russell & Co. not being any party to the contract between T. Wiggin & Co. and Breed.

4, and 5. Such losses as Russell & Co. were, without any fault of their own, compelled to sustain, will furnish the measure of damages in both cases. With respect to the bills

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protested for non-acceptance, and then returned to Manilla, and afterwards sent again to England for payment, if Russell, Sturgis & Co. can recover at all, I think they must recover according to the principle on which the Court at Manilla acted; for even if that decision was wrong, still it was a decision binding on Russell, Sturgis & Co., and has wrought a damage to them, immediately flowing from the misconduct of T. Wiggin & Co.

M. D. HILL, *Chancery Lane*, Nov. 31, 1842.

The cause was argued by *C. G. Loring* and *F. C. Loring* for the plaintiffs, and by *Charles P. Curtis* for the defendants.

The argument for the plaintiffs was as follows:

The general facts of the case make a *prima facie* case for the plaintiffs. The grounds of the defence are understood to be, 1st. that Breed did not keep his contract with the defendants, and, therefore, they are not bound to honor the bills; 2d, that there is no privity between the parties to this suit.

As to the first question, if Breed did not perform his contract, the defendants had the power to enforce performance, or obtain security. Having neglected to exercise this power, the loss should fall upon them, and not upon an innocent party.

If the plaintiffs had knowledge of this contract, it would not alter the case: 1st, because its performance was not made a condition precedent to the honoring of the bills: 2d, because they could not know whether it was performed or not; 3d, because, in fact, there had been no breach committed when they received the bills; and 4th, because it was a contract between Breed and the defendants exclusively. But the case finds, that they did not know of its existence.

With regard to the second question, we say, that a privity of contract did exist between the parties. To this contract, Breed and the defendants certainly were parties; and the

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question now is, whether or not the plaintiffs are also parties. The letter of credit purports to be an engagement, that the bills drawn under it should be honored.

It was the intention of both parties, that it should be carried to India, and shown to persons there, who would thereby be induced to receive the bills to be drawn under it, in payment for goods furnished. This is the definition of a letter of credit. Beawes Lex. Merc. pl. 470 ; 3 Chitty Com. and Man. 336.

If this be not admitted, it must be inferred from the terms of the letter ; it not being addressed to Breed, but being an open letter ; and from the usage of merchants ; and because it would have been wholly useless to Breed, if it were not to be shown to others.

If the letter had been addressed to the plaintiffs, by name, it will not be denied, that it would constitute an express promise to them to honor the bills, for the breach of which, the defendants would be liable to them in damages. Nor does the fact, that they are not named in it, but that it is an open letter, make any difference.

It is not essential to a contract, that all the parties should be named in it ; or that they should be known, or even be in existence, when it is made. Thus, where a reward is offered for the discovery of thieves, there is no contract with any one in particular ; but any person given the desired information, may claim the reward, and may maintain an action for it. Chitty on Contracts, p. 10, n. 9 ; *City Bank v. Bangs* (2 Edwards, 95) ; *Williams v. Carwardine* (5 C. & P. 556) ; *Lancaster v. Walsh* (4 M. & W. 16). So, in cases of trusts created for the benefit of creditors, it is not usual to mention them by name, but any one of that character may become a party to the contract. So, in cases of marriage settlements, where trusts are created for the benefit of children to be born.

This contract has grown out of the usages of trade ; and

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the necessities of merchants, and its utility, would be greatly impaired, if it were necessary to address it to a particular house. Such a contract has been well defined by Chief Justice Marshall as an "*assumpsit* to the world, entitling any one, who acts upon the faith of it, to an action."

In this country, the question, whether this action can be maintained, can hardly be considered an open one. *Duval v. Trask* (12 Mass. 154); *Carnegie v. Morrison* (2 Metcalf, 481); *Ontario Bank v. Worthington* (12 Wendell, 393); *Goodrich v. Johnson* (15 Johnson, 6); *McKim v. Smith* (1 Hall's Law Journal, 486); *Laurason v. Mason* (3 Cranch, 493); *Schimmelpennich v. Bayard* (1 Peters, 264); *Townley v. Sumrall* (2 Peters, 170); *Bryce v. Edwards* (4 Peters, 111); *Edmonston v. Drake* (5 Peters, 624); *Adams v. Jones* (12 Peters, 207); *Wallace v. Agry* (4 Mason, 336); *Wildes v. Savage* (1 Story R. 22); *Baring v. Lyman* (1 Story Rep. 396.)

But it will be argued, that the contract was to be performed in England, and is to be construed by the English law; and by that law, there is no privity of contract between the parties; and to prove this, the opinions of eminent English counsel are produced. This presents two questions: 1st, What is the law in England on this subject? 2d, If it be different from the law here, is it to govern this contract?

There is not a decision to be found in the English reports, nor even a *dictum*, to the effect, that an action will not lie against a party promising to honor a bill in favor of one, who takes it on the faith of that promise. Whenever the question has been suggested, a contrary opinion has been expressed. *Beawes Lex. Merc.* 444, pl. 112; 470, pl. 245; *Mylne v. Priest* (Holt, N. P. R. 181); *Byles on Bills*, 108; *Chitty on Bills*, 313; 3 *Chitty on Com. and Man.* 336; *Montefiore Prec.* 450; *Bouvier's Law Dict.*; *Fell on Guaranty*, c. 3, pl. 17, 18, 22; *Coleman v. Usscott* (5 Vin. Ab. 527, pl. 17); *Bayley on Bills*, 5th ed. 1836, p. 167, Boston.

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This is better evidence of what the law is, than the opinions of counsel, however eminent ; they are not the best evidence the case admits of.

But if it were shown, that this action, in its present form, could not be maintained in England, two questions remain ; 1st, Whether this contract is to be governed by the laws of England, or of this State, where it was made ; and 2d, Whether the plaintiffs would be without any remedy in England. The first question is most elaborately discussed in the case of *Carnegie v. Morrison* (2 Metcalf, 381), and the decision is, in point, in favor of the plaintiffs.

As to the second question, there can be no doubt, but that the plaintiffs might obtain a remedy, in some other form, in England.

They might maintain an action on the case for a deceit, alleging, that the defendants made this contract with Breed, with the intent, that it should be shown to the plaintiffs, and they be thereby induced to trust him ; and that they did so, and that defendants neglected to perform their contract ; and it would not be material, that the promise or representation was not made to the plaintiffs directly. *Foster v. Charles* (7 Bingham, 105) ; *Corbett v. Brown* (8 Bingham, 33) ; *Polhill v. Walter* (3 B. and Ad. 114). Or a remedy might be obtained in equity, on the same ground of a constructive fraud (1 Story Eq. Juris. p. 384) ; or for a specific performance of the contract (2 Story Eq. Juris. c. 18) ; or on the ground of an equitable assignment of funds in the defendants' hands, of which the letter of credit is an admission (2 Story Eq. Juris. p. 1041 to 1047).

If, then, in England, at law or in equity, the plaintiffs might recover damages or obtain relief for the breach of this contract, the laws of England recognize its obligation.

Whether that remedy should be enforced at law, or in equity, by an action of *assumpsit*, or on the case, is to be de-

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terminated by the *Lex fori*, and by the *Lex fori*, it is admitted, this action may be maintained.

The plaintiffs claim as damages the amount of all the bills dishonored by non-payment, whether accepted or not, with the reëxchange paid by them, and interest.

The contract of the defendants was to honor the bills ; which contract was not performed by accepting, and afterwards refusing payment. The plaintiffs are entitled to recover all the damage they suffered by the breach of the contract ; which includes the reëxchange paid on the accepted bills ; and they are not to be considered merely as holders of those bills. *Riggs v. Lindsay* (7 Cranch, 500).

C. P. Curtis, for the defendants, stated, that he should rely on several well-settled principles of the law of contracts, which he thought would entitle the defendants to a judgment in their favor. The contract, relied on by the plaintiffs in this case, was that of November 4, 1835 ; by which the defendants authorized the agent of Mr. Breed to value (or draw) on them, in London, for not exceeding £15,000, and engaging that bills, drawn in conformity to the terms of that instrument, should be duly honored ; that is, *accepted and paid*. The acts to be done by the defendants, according to said contract, were to be performed in England ; namely, to accept and pay bills of exchange. That is the place of the performance of this contract. By the law of that place, and not by the law of Massachusetts, where the contract was entered into, is the contract to be governed. Where a contract is, expressly or tacitly, to be performed in any other place than where it was made, the general rule is, in conformity with the presumed intention of the parties, that the contract, as to its *validity, nature, obligation, and interpretation*, is to be governed by the law of the place of performance. Story, *Confl. of Laws*, p. 280 ; *Andrews v. Pond* (13 Peters, 65) ; *Pren-*

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tiss v. Savage (13 Mass. 20). If a contract is to be *executed* in a foreign country, the place of the making of it is immaterial. *Fanning v. Consequa* (17 Johns. 518). No act whatever was to be performed under the contract in this case, in Massachusetts. It was to be sent immediately to the East Indies, and it was only bills drawn *in India*, that the defendants engaged to honor; and these, no where but *in London*. This is a clear case of a contract made here, but to be *executed* in a foreign country. It looks, then, to the foreign law for its validity and interpretation. But what foreign law is to govern it; that of India, or of England? So far as relates to the defendants, the latter. All that they obligate themselves to do, is to be done in England. If it were a question, by what law the drawer or endorsers of the bills in question were to be governed, it would require a different answer. They are presumed to contract with reference to the law where *their* contracts were to be performed; namely, in India. If the law of England is to govern, as to the interpretation, nature, validity, and obligation of the defendants' contract, the next inquiry is, what is the law of that country in reference to such an instrument as constitutes the basis of this suit?

The unwritten law of a foreign country is a *fact* to be proved by the opinions of judges and learned lawyers. Story, *Confl. Laws*, p. 638. For the purpose of showing, what the law of England is, we produce the opinions in writing of four of the most learned counsel at the English bar; Sir William Follett, Sir John Bayley, Sir Frederic Pollock, and Mr. Matthew Davenport Hill. They all concur in the opinion, that, by *the law of England*, the letter of credit, and the acts of the parties, do not create any contract between Wiggin & Co. and Russell, Sturgis, & Co., to accept bills drawn under that letter; and that R. S. & Co. could not maintain in England any action against these defendants, founded on the said

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letter, for want of privity, or consideration passing between them. This evidence is uncontradicted, notwithstanding there has been ample time for the plaintiffs to procure the testimony or opinions of other learned counsel in England, if there were any doubt as to the accuracy and soundness of those produced by defendants. We must take it, then, to be the law of the place of the performance of this contract—which is the law of the contract—that the plaintiffs have no legal demand against the defendants in that country; and, therefore, as this Court is to be governed by the law of that country, as to the validity and obligation of the contract, it seems to follow, of course, that they have no legal demand against the defendants here. If the premises are well founded, the conclusion seems to be irresistible. Most, or many of the authorities, cited by the plaintiffs' counsel, relate to the point, that a promise in writing to accept a non-existing bill, if shown to a third person, who takes the bill on the faith of such promise, is, in effect, an acceptance of the bill, and may be availed of as such by any subsequent holder of the bill. The authorities show this to be the law of the United States; but it is not the law of England, by which law this case is to be governed in this particular, as well as the former. *Johnson v. Collings* (1 East, 98); *Ex parte Bolton* (3 Mont. and Ayrton, 367). The opinions of Sir W. Follett and the others, are explicit on the point, that such a promise in writing is not equivalent to an acceptance, though the bill be taken on the faith of it. *Quâ cunque viâ datâ*, therefore, the plaintiffs cannot prevail, if the law of England is the law of this contract.¹ That it is so, we have shown by the authorities before cited.

STORY J. This cause has been very ably argued. There is no count in the declaration upon any accepted bill of ex-

¹ The views of the learned gentlemen, whose opinions are given above, have been confirmed by the Court of Exchequer in the recent case of *Bank of Ireland v. Archer* (2 Mees. & Welsby, 363).

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change ; and, therefore, the whole class of authorities, English and American, so far as respects their direct bearing upon the question, whether a promise to accept a non-existing bill amounts to a positive acceptance thereof, when drawn, in favor of a holder, who takes the bill upon the faith of such promise, may be at once dismissed from our consideration, although they certainly must have a very forcible bearing upon one of the questions actually raised in the present case. In the case of *Wildes v. Savage* (1 Story's R. 22), I had occasion to consider those authorities somewhat at large ; and the result was, that although the English authorities might not now be deemed fully to support the doctrine, that such a promise would under such circumstances amount to an acceptance ; yet the American were direct and positive to the purpose. Indeed, although there seems little doubt, what is the present inclination of opinion in England, yet there is no pretence to say, that there is any positive adjudication in England, in opposition to the doctrine ; and I may add, that in one of the latest cases, in which the subject came before the Court, that eminent commercial lawyer, Lord Chief Justice Gibbs, seemed to entertain an opinion directly in favor of the American doctrine ; and he distinguished the case before him on that point upon the peculiar facts. *Miln v. Prest* (4 Camp. R. 393 ; S. C. 1 Holt's N. P. R. 181). And it would be no matter of surprise to me, that if the doctrine contended for at the present argument, should be established to be the law in England (as it is affirmed by Sir Frederick Pollock and Sir William Follet, and the other learned gentlemen, whose opinions have been produced at the argument), that a promise to accept a bill would create no contract, except between the drawer and the promissor, although shown, and designed to be shown, to induce the holder to take it, upon the ground of a want of privity between the holder and the promissor ; I say, it would be no matter of surprise to me, that the Courts of Eng-

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land should, whenever the question shall again arise, go back to the doctrine of Lord Mansfield in *Pillans v. Van Mierop* (3 Burr. R. 1663), and *Pierson v. Dunlop* (Cowp. R. 571), as founded in a wholesome, nay, necessary justice, to prevent gross frauds, and manifest and irretrievable mischiefs in the intercourse of the commercial world.

There are two questions properly arising upon the state of facts presented to this Court. The first is ; Where is the contract of the defendants to be deemed to be made ? Or, in other words, is it, as to its obligation, construction and character, to be governed by the law of Massachusetts, where it was signed and executed by the agent of the defendants ? Or, is it to be deemed a contract made in England, where the acceptance was to be made ; in which case, it is to be governed, in the like particulars, by the law of England, assuming that law to differ from the law of Massachusetts ? The second question is ; Whether a promise, contained in a letter of credit, written by persons, who are to become the drawees of bills drawn under it, promising to accept such bills when drawn, which letter, although addressed to the persons, who are to be the drawers of the bills, is designed to be shown to any and all person or persons whatsoever, to induce them to advance money on, and take the bills, when drawn, will be an available contract in favor of the persons, to whom the letter of credit is shown, who advance money and take the bills on the faith thereof, or is void for want of privity between them and the persons writing the letter of credit ?

I cannot say, that I entertain any serious doubts as to either question. As to the first, the letter of credit was executed in Boston, by the agent of the defendants, with full authority for the purpose ; and it is, to all intents and purposes, the same, in legal effect, as if it had been there personally signed by the defendants themselves. It then created an immediate contract between the parties, in Boston, and it is to be governed,

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as to its obligation, construction and character, by the law of Massachusetts, and not by the law of England ; if, indeed, there be any distinction between them on this subject, which I am very far from believing there is. The contract was clearly valid and binding by the law of Massachusetts. It is true, that the contract is, to accept bills drawn on the defendants in London, and, of course, the acceptance is there to be made. But that does not make it less obligatory upon the defendants to fulfil their promise to accept, although the acceptance, in order to be valid, must be made according to the requirements of the English law. Suppose a like letter of credit were executed in Boston, to accept bills payable in Paris in France, where an acceptance, to be binding, must be in writing, (although, by our law, it may be verbal), there can be no doubt, that, unless there was a written acceptance in Paris, no remedy could be had upon any bill drawn in pursuance of the letter of credit, as an accepted bill. But there is as little doubt, upon principles of international law and public justice, that, in such a case, the contract, being made in Massachusetts, and being valid by the laws thereof, would be, and ought to be, held valid in all judicial tribunals throughout the world, and enforced equally in France, in England, and America, as a subsisting contract, the breach of which would entitle the injured party to complete redress for all the damage sustained by him. The case of *Carnegie v. Morrison* (2 Metcalf's R. 381), is directly in point, upon this very question ; and I entirely concur in that decision.

The second question, is one, upon which, until I heard the present argument, I did not suppose, that any real doubt could be raised, as to the law, either in England or America. I cannot but persuade myself, that the doctrine of both countries, as far as this question is concerned, is coincident, notwithstanding the opinions of the learned counsel, which have been brought to the notice of the Court upon the present occasion,

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(and for which, certainly, I feel an unaffected respect and deference), and which assert, that the English doctrine denies all redress, under the circumstances, to the holder of the bills, and confines the whole remedial redress to an action between the drawers and the drawees of the bills, upon the ground, that there is a want of privity between the drawees and the person, who takes the bills, as purchaser, or holder. The case of *Marchington v. Vernon*, cited in a note to 1 Bos. & Pull. 101, before Mr. Justice Buller, seems to me fully to support the contrary doctrine.

Assuming, however, that there is a total want of privity between the parties in the present suit, the conclusion, to which these learned jurists have arrived, may be admitted fairly to follow as a result of the doctrine of the common law, although I entertain great doubt, whether, under such circumstances, a Court of Equity would not, and ought not, to administer complete relief, as a case of constructive fraud upon third persons. But my difficulty is in the assumption, that, in the present case, there is no privity of contract between the plaintiffs and the defendants. It appears to me, that this is an inference not justly deducible from the facts; and I know of no authority in English jurisprudence, which countenances, far less any, which establishes it, under circumstances like the present. On the contrary, I have understood, and always supposed, that, in the commercial world, letters of credit of this character were treated as in the nature of negotiable instruments; and that the party, giving such a letter, held himself out to all persons, who should advance money on bills drawn under the same, and upon the faith thereof, as contracting with them an obligation to accept and pay the bills. And I confess myself totally unable to comprehend, how, upon any other understanding, these instruments could ever possess any general circulation and credit in the commercial world. No man is ever supposed to advance money upon

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such a letter of credit, upon the mere credit of the party, to whom the letter is given; and I venture to affirm, that no man ever took bills on the faith of such a letter, without a distinct belief, that the drawee was bound to him to accept the bills, when drawn, without any reference to any change of circumstances, which might occur in the intermediate time between the giving of the letter of credit and the drawing of the bills under the same, of which the holder, advancing the money, had no notice. Any other supposition would make the letter of credit no security at all, or, at best, a mere contingent security, and the money would, in effect, be advanced mainly upon the credit of the drawer of the bills, which appears to me to be at war with the whole objects, for which letters of credit are given. Let me state one or two cases to illustrate the doctrine, which, it seems to me, is applicable to letters of this sort. Suppose the present letter of credit had contained an express clause, by which the defendants should directly promise any and all persons, who should advance money and take bills on the faith thereof, that they would accept and pay the bills, so drawn, in their favor; can there be any doubt, that the promise would be available in favor of the persons making such advances, and create a direct privity of contract between them and the person, who gave the letter of credit? If there could be no doubt in such a case, then it seems to me, that the circumstances of the present case, and, indeed, of all cases of letters of credit of a similar character, do naturally and necessarily embody an implied promise to the same extent, and, therefore, ought to be governed by the same rule; for there can, in the intendment of the law, be no just distinction between cases of an express promise and cases of an implied promise, applicable to transactions of this sort. Again, suppose, when the plaintiffs were about to advance their money on their bills, with the letter of credit before them, a partner, or authorized agent, of the firm of Wiggin &

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Co. had stood by, and said, Take these bills on the faith of this letter of credit, and our house will duly accept and pay them, and, upon the faith of that statement, the money was advanced, and the bill was taken ; could there be a doubt, that there would be a privity of contract created directly between the plaintiffs and the defendants, and that they might compel the defendants to accept and pay the bills, or indemnify them for the breach thereof? And yet, stripped of its mere external form, that is the very case before the Court. The letter of credit was drawn to be carried abroad, and to be shown to any person or persons, who would advance funds thereon to the drawers, and it imported, that, if any persons, to whom it was shown, should advance the money, and take the bills on the faith thereof, the defendants would accept and pay the bills. Their letter of credit spoke this language to all the world, as expressively, as if they had stood by, and repeated it by their agent.

Take the case of a common letter of guaranty, where the guarantor says, in general terms, in a paper addressed to A. B., the party, for whose benefit it is given, "I hereby guaranty to any person, advancing money, or selling goods, to A. B., not exceeding £100, the payment thereof, at the expiration of the credit, which shall be given therefor." Can there be a doubt, that any person, making the advances, or selling the goods, upon the faith of the letter, is entitled to treat the paper as containing a direct and immediate promise to himself to guaranty the payment, notwithstanding it is addressed to A. B. ? In the commercial world, as far as I know, no doubt has as yet ever been entertained on this subject ; and yet, transactions of this sort are of every day's occurrence, especially where the person, by whom the advance is to be made, is uncertain or unknown. The case of *Adams v. Jones* (12 Peters R. 207, 213) is in point to show, that such a guaranty, in such general terms, will bind the guarantor in favor of any

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person, who shall trust the party upon the faith and credit of the guaranty. There is no pretence, in such a case, to say, that there is not a sufficient consideration for the promise or obligation ; for the consideration need not be immediately for the benefit of the guarantor ; but it will be sufficient, if there be a valuable consideration, moving from the guarantee at the request of the guarantor, in favor of a third person, for whom the benefit is designed. It is like the common case, where one man, for a valuable consideration of forbearance, or otherwise, undertakes to pay the debt of another. The question is not of gain to the promisor, but of loss, or detriment, or delay, on the part of the promisee. Lord Mansfield's reasoning, in *Pillans v. Van Mierop* (3 Burr. R. 1663), treats it as a clear case of a sufficient consideration ; that it is a mercantile transaction ; and that the very nature of it imports an undertaking by the promisor to the persons taking the bills, to honor them. Lord Mansfield went further in that case, and held, that the agreement to accept amounted to an actual acceptance in favor of the party, upon the ground, that he advanced the money, and drew the bill, upon the faith of the prior negotiations and promise. Mr. Justice Yates, in the same case, said, that "any damage to another, or suspension, or forbearance of a right, is a foundation for an undertaking, and will make it binding, although no actual benefit accrues to the party undertaking." He added ; " Now, here, the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs." In the case at bar a benefit did, in fact, accrue to Wiggin & Co. ; for, in no other way, could they have received the interest and advances intended to be obtained by their grant of the letter of credit. In *Pierson v. Dunlop* (Cowper, R. 571, 573), and in *Mason v. Hunt* (1 Doug. R. 297), Lord Mansfield took notice of the true distinction between cases, where a promise enures solely between the parties, and where it enures in favor of a third person

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also. "It has been truly said, as a general rule, (was his language), that the mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance, unless accompanied with circumstances, which may induce a third person to take the bill by indorsement. But, if there were such circumstances, it may amount to an acceptance, although the answer be contained in a letter to the drawer." The cases of *Johnson v. Collings* (1 East, R. 98), and *Clarke v. Cock* (4 East, R. 56), do not, in any manner, shake the propriety of this doctrine, as to its creating a privity of contract between the parties, whether it amounts to an acceptance, or not; and Mr. Justice Le Blanc, in both cases, expressly recognised Lord Mansfield's doctrine, as containing the true limitations and distinctions, which ought to govern in all cases of this sort. In the case of *Johnson v. Collings*, as well as in the case of *Mihl v. Prest* (4 Camp. R. 393), the promise to accept had not been shown to the party taking the bill, and, therefore, the bill was not taken on the faith thereof. Nor, indeed, had it been even authorized to be shown to the party; which constitutes the striking difference between such a promise and a letter of credit, the letter being, *ex vi termini*, designed to be shown, if necessary, to obtain the very credit or advances from a third person. Lord Mansfield, indeed, guarded himself on this very point, and said, not, that it always does create an acceptance, but that it may do so. Now, if it would, in any case, create an acceptance, *a fortiori* it would create a privity of contract, founded upon the promise to accept; for the latter must, in all cases, constitute the foundation of the former. In none of these cases was the point presented exactly under the view, in which it now comes before this Court. In neither of them was there a letter of credit designed to circulate, and thus to preserve credit to the bills, which should be drawn. And not one word, in the reasoning of any of these cases, hints at any suggestion, that a letter

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of credit, in its commercial sense, would not create such a privity, if it was intended to be shown and used to induce any third person to advance money on the bills. If the question were entirely new, I confess, that I should not entertain the least doubt, that, according to the known course of mercantile transactions upon letters of credit of this sort, the giver and the receiver intended them to be a circulating medium of credit for the receiver, and that the promise to accept should be an obligatory contract with any and every person who should advance money on the bills on the faith thereof. The language of Lord Mansfield, in *Mason v. Hunt* (1 Doug. R. 297, 299), is exceedingly strong for this purpose: "There is no doubt (said he) that an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawer. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawer, or any other person, may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances, which might subsist between the drawer and the acceptor. But an agreement to accept is still but an agreement; and, if it is conditional, and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to such conditions." Now, it is impossible to read this language, and not to feel, that, if the case were one of a letter of credit, designed by the parties to be used upon the exchange, it would necessarily create a privity of contract between the party, advancing his money, and the drawee, binding upon the latter. In short, the contract would be a contract, not with the drawer alone, but with any party, who should advance the money on the faith of the letter. I have seen no case in England, which shakes, much less which overturns, this doctrine. And, if there were, I should pause a great while, be-

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fore I could bring my mind to desert the clear judgment of that great judge, Lord Mansfield, never excelled as a judge in the administration of commercial jurisprudence, upon a question of such plain equity and justice, in favor of any other and subsequent adjudication by other minds. I consider a letter of credit, drawn, like the present, for purposes of a general nature, to be equivalent in import and intention to the following language; "Take this letter of credit, show it to any person whatsoever, and I promise any person, who shall, on the faith thereof, advance you money on bills drawn within the scope thereof, that I will accept and pay those bills." I confess myself unable to perceive, upon any grounds of the common law, or of common sense and justice, why such a circulating promise should not be obligatory.

But, be the English doctrine as it may be, the present case must be governed, not by that law, but by the commercial law of America, where the contract was entered into. And it is perfectly clear, at least, in the jurisprudence, which is enforced in the Supreme Court of the United States, that a letter written within a reasonable time, either before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person, who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding upon the person, who makes the promise. This was expressly so held by the Supreme Court in *Coolidge v. Payson* (2 Wheat. R. 66, 75), and has been fully recognised and established by that Court in every subsequent case, which has arisen on the subject, and especially in *Schimmelpennick v. Bayard* (1 Peters' R. 284), and *Boyce v. Edwards* (4 Peters' R. 111). Now, it is plain, that, if such a promise becomes, as it were, a circulating promise to accept the bill, when drawn, in favor of, and to any party, who shall take the bill upon the faith of such promise, and operates as an acceptance of the bill, it must be, because the

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promise to accept, in such a case, is a promise by intendment of law made to the party, who takes the bill, and then, at his election, it may be treated as an acceptance, or as a promise to accept. This, therefore, alone, would establish the point of a privity of contract between the party, giving the letter of credit, and the party, advancing the money, and taking the bill on the credit thereof; and it is manifestly founded on a sufficient consideration. Now, I know of no just or reasonable ground, upon which a distinction can be maintained between an implied acceptance, in favor of the person, who makes advances, and takes the bill under such circumstances, and a promise to accept the bill. In each case it enures as a direct contract with the party, founded upon the intent and the object of the letter of credit, or the written promise; and he has, and ought to have, his election, either to treat it as a positive acceptance, or as a promise to accept made directly to him, through the open letter of credit addressed to him, either specially or generally, for that purpose. Such is the doctrine, which, for many years, I have constantly supposed to be well established in the practice of the commercial world, and, therefore, never questioned in Courts of Justice; and, upon this very doctrine, my judgment proceeded in the recent case of *Baring v. Lyman* (1 Story's R. 397, 414, 415; S. C. 4 Law Reporter, 303). It does not, however, rest upon my single opinion; but it has been fully recognised by the Supreme Court of the United States. In *Townslay v. Sumrall* (2 Peters' R. 170, 181), the Court said: "If a person undertake, in consideration, that another will purchase a bill already drawn, or to be thereafter drawn: and, as an inducement to the purchase, to accept it, and the bill is drawn and purchased upon the credit of such promise, for a sufficient consideration; such promise to accept is binding upon the party. It is an original promise to the purchaser, not merely a promise for the debt of another; and, having a sufficient

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consideration to support it, in reason and justice, as well as in law, it ought to bind him. It is of no consequence, that the direct consideration moves to a third person, as, in this case, to the drawer of the bill; for it moves from the purchaser, and is his inducement for taking the bill. He pays his money upon the faith of it, and is entitled to claim a fulfilment of it. It is not a case falling within the objects or the mischiefs of the statute of frauds. If A says to B, "Pay so much money to C, and I will repay it to you," it is an original, independent promise; and, if the money is paid upon the faith of it, it has been always deemed an obligatory contract, even though it be by parol; because there is an original consideration, moving between the immediate parties to the contract. Damage to the promisee, constitutes as good a consideration as benefit to the promisor. In cases, not absolutely closed by authority, this Court has already expressed a strong inclination not to extend the operation of the Statute of Frauds, so as to embrace original and distinct promises, made by different persons at the same time, upon the same general consideration. Then, again, as to the consideration, it can make no difference in law, whether the debt for which the bill is taken, is a preëxisting debt, or money then paid for the bill. In each case, there is a substantial credit given by the party to the drawer, upon the bill, and the party parts with his present rights at the instance of the promisee; whose promise is substantially a new and independent one, and not a mere guaranty of the existing promise of the drawer. Under such circumstances, there is no substantial distinction, whether the bill be then in existence, or be drawn afterwards. In each case the object of the promise is, to induce the party to take the bill upon the credit of the promise; and if he does so take it, it binds the promisor. The question, whether a parol promise to accept a non-existing bill, amounts to an acceptance of the bill, when drawn,

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is quite a different question, and does not arise in this case. If the promise to accept were binding, the plaintiff would be entitled to recover, although it should not be deemed a virtual acceptance." In *Boyce v. Edwards* (4 Peters, R. 111, 121, 122, 123), the Court held, that if, in the particular case, by reason of the bill to be drawn not being definitely described, in the manner limited by the case of *Coolidge v. Payson* (2 Wheat. R. 75), the promise to accept would not operate as an acceptance of the bill in favor of the party receiving it, still, it would operate as a promise to him to accept the bill, when drawn, and thus be equally available for him. The language of the Court, upon that occasion, was ; — "The rule laid down in *Coolidge v. Payson* requires the authority to be pointed to the specific bill or bills, to which it is intended to be applied, in order, that the party, who takes the bill upon the credit of such authority, may not be mistaken in its application." And again: "The distinction between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept, seems not to have been adverted to. But the evidence necessary to support the one or the other, is materially different. To maintain the former, as has been already shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter, the evidence may be of a more general character, and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of the promise. Courts have latterly leaned very much against extending the doctrine of implied acceptances, so as to sustain an action upon the bill. For all practical purposes, in commercial transactions in bills of exchange, such collateral acceptances are extremely inconvenient, and injurious to the credit of the bills; and this has led judges frequently to express their dissatisfaction, that the rule had been carried as far as it has; and their regret, that any other act, than a written

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acceptance on the bill, had ever been deemed an acceptance. As it respects the rights and the remedy of the immediate parties to the promise to accept, and all others, who may take bills upon the credit of such promise, they are equally secure, and equally attainable by an action for the breach of the promise to accept, as they could be by an action on the bill itself."

The case of *Adams v. Jones* (12 Peters, R. 207, 213), is equally explicit to show, that a written promise, made to one person, may enure as a promise in favor of another person, who gives credit on the footing of that promise, where the terms of the latter are such as prove, that it was intended to be shown, and to produce that very credit.

The case of *Carnegie v. Morrison* (2 Metc. R. 381, 395, 396), is also an authority to the same purpose; and, indeed, it runs on all fours with the present case.

It is unnecessary for me to add, that my own judgment is persuasively governed by these decisions, not merely as authorities, (although that would be a decisive ground), but upon principle, as tending to further and establish commercial confidence, and to give that sanctity, circulation, and faith, to letters of credit, which constitute the very foundations, upon which they were first built, and by which alone they can be sustained in the business of modern commerce. My judgment, therefore, is, that the plaintiff is entitled to recover the amount of the damages sustained by the refusal of the defendants to accept the bill in controversy.

What should those damages be? Should they cover all the money actually paid upon the protested bills by the plaintiffs, including reëxchange, together with interest; or should the reëxchange be excluded? It is clear, that the acceptor is not, ordinarily, bound to any holder to pay reëxchange, upon his refusal to pay the bill; but only to pay the principal and interest. But, here, the drawees (the defend-

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ants) have promised to accept and pay the bill upon a sufficient consideration; and I do not perceive any ground, why the defendants should not be bound to indemnify the plaintiffs against all losses, including reëxchange, which have been the natural and necessary consequence of their refusal to perform their contract made with the plaintiffs. The defendants are not sued as acceptors; but as special contractors, who have broken their contract; by which breach the plaintiffs have been compelled to pay the very moneys, including reëxchange, which they now seek to recover back. It seems to me, that they are entitled to the full amount paid by them, and interest upon the same from the time when it was paid. That interest should be the interest of the place, where the money was payable by the plaintiffs, and, of course, where they were to be reimbursed. The case of *Riggs v. Lindsay* (7 Cranch, R. 500), seems to me a clear and satisfactory authority, that the plaintiffs are entitled to a full reimbursement of all the sums paid by them, including reëxchange. This also appears to have been the opinion of Mr. Justice Bayley, in his work on Bills of Exchange. (Bayley on Bills, ch. 9, p. 353, 5th London edit. 1830. *Id.* Amer. edit. p. 380). It was also directly affirmed by Lord Camden, in *Francis v. Rucker* (Ambler, R. 672). Pothier holds, that the acceptor is, in all cases, bound to pay the reëxchange to the holder, in the same manner, as the drawer would be, (Pothier De Change, n. 117), which is carrying the rule beyond what our law seems to justify.¹

For these reasons I am of opinion, that the whole damages and costs, and expenses paid by the plaintiffs, including reëxchange, with interest, are to be included in the judgment for the plaintiffs.

¹ *Napier v. Schneider* (12 East, R. 420); *Woolsley v. De Crauford* (2 Camp. R. 445). See also Story on Bills of Exchange, § 459 to § 463.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MAINE, MAY TERM, 1842, AT PORTLAND.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. ASHUR WARE, District Judge.

CHARLES GORDON v. POLLY HOBART AND ANOTHER.

WHERE a Bill in Equity was brought by A. as assignee of B., no waste being charged therein, and the subject-matter was referred to a Master to report thereon, who was not authorised to report upon the question of waste, but who nevertheless did, with the consent of the parties, report thereupon; *It was held*, that waste committed before the assignment could not be inquired into by an assignee; that all of the report pertaining to waste should be stricken out; that even, if such matter had been charged in the bill, the Master, not being directly authorised thereto, could not acquire any authority beyond his commission by the consent of parties.

Where A. mortgaged certain property to B. to secure a loan of \$3000, no rate of interest being therein fixed, upon the agreement, that A. should take from B. a lease thereof at the yearly rent of \$270, which rent was paid until the mortgagee took possession; *It was held*, that the lease was a mode of securing usurious interest, and was, therefore, not valid; but that legal interest should be allowed in Equity, upon the \$3000, for the whole period.

There having been various business transactions between A. and B., and various notes received from A. by B., no specific application of which by the mortgagor was shown; *It was held*, under the circumstances, that the notes were not to be applied to the payment of the \$3000.

Where money is paid by, or received for a debtor by his creditor, the debtor

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may appropriate it to the payment of whatever debt he pleases ; if he omit to appropriate it, the creditor may apply it to the satisfaction of whatever demand he pleases ; if neither party apply it, and various debts be due, the Court will make the appropriation thereof, according to the equity of the case.

This right of appropriation exists only between the original parties ; and, therefore, *It was held*, in this case, that the assignee of A. could not insist, that money in the hands of B. belonging to A. should be applied in discharge of the mortgage.

BILL in Equity. The Bill in substance stated as follows : That John Gordon, on the 25th of November, 1814, mortgaged to John Hobart three lots of land, namely, two in Westbrook, and one in Cape Elizabeth, for the payment of three thousand dollars, loaned to the said Gordon by the said Hobart. That no rate of interest on the said sum was fixed by the form of the said mortgage security ; but that the said Hobart exacted an usurious interest of nine per cent. by requiring, as a part of the transaction aforesaid, an indenture of lease of the mortgaged premises, to the said Gordon, at the yearly rent of two hundred and seventy dollars ; and that the said Hobart did actually demand and take from the said Gordon the aforesaid usurious interest, under the form of a stipulation for rent. That the said mortgage deed being an usurious security for money loaned contrary to the statute, and, therefore, void in law, can only be sustained in Equity for what may be due in equity and good conscience.

That John Gordon, on the 27th of November, 1815, in order to secure the said Hobart against a liability as indorser of his note for \$1600, being a loan from the Cumberland Bank, made over to him, the said Hobart, two promissory notes of Josiah Pierce, bearing date Nov. 24th, 1815 ; and also, as a further security, mortgaged to him certain wharves and flats in Westbrook, then considered amply sufficient to secure the said Hobart, as indorser of the said note. That the said note, having been made to meet a liability of the said

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Gordon at the Cumberland Bank, was continued and renewed from time to time, and indorsed at each renewal by the said Hobart; and that the said Gordon, for the further security of said Hobart, on the 9th of December, 1817, caused to be made and delivered to him the promissory note of John Warren and Nathaniel Warren, of that date, for \$876, due from the said Warrens to the said Gordon. That it was expected, that payment of the said Warrens' note should not be required immediately, but that it should simply lie in Hobart's hands, while he was contented with its security; as had been the case with Pierce's notes above-mentioned. That as the amount of the said Pierce's and Warrens' notes was more than sufficient to pay the bank note for \$1600, it was intended, that the surplus, whenever received by Hobart, should be applied in part payment of his (Hobart's) claim for the \$3000 aforesaid. That on Sept. 10th, 1816, the said Gordon had given a further sum of \$344.27, which, unless required for the indemnity of said Hobart, was to be applied to the satisfaction of his demand against said Gordon. That John Gordon, on the 9th of December, 1817, John Warren and Nathaniel Warren aforesaid, being indebted to him \$3000, caused their note to be made to the said Hobart for \$2124. That the said Pierce's and Warrens' notes remaining, as Gordon supposed, unpaid, and it being uncertain how far Hobart was secured, as indorser of said \$1600 note, by the prior mortgage, the said Gordon, on the 30th of December, 1817, mortgaged two other parcels of land in Cape Elizabeth to the said Hobart as collateral security for the indorsement of the said \$1600 note. That the said Gordon paid the \$270, under the name of rent, as aforesaid, for two years, making the sum of \$540, the excess of which above legal interest ought to have gone towards the satisfaction of the said Gordon's debts to the said Hobart. That the said Hobart never demanded the \$3000 above-mentioned; but in the

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Spring of 1820, he took possession, with the consent of Gordon, of all the premises mortgaged, both for the \$1600 note and for the \$3000. That the said Gordon, on the 7th of March, 1818, delivered to the said Hobart the promissory note of Barnabas Sawyer and Joshua Webb, for \$1000; on which note said Hobart received about \$600, which ought to have been applied as aforesaid. That the said Gordon, on the 4th of March, 1819, delivered to the said Hobart the promissory note of Samuel A. Proctor for \$625, the whole of which the said Hobart afterwards received.

The Bill admits, that the said Hobart had a right to hold the aforesaid securities, and to apply the same for his indemnity; but insists, that he was bound, after being indemnified for the indorsed bank note, to appropriate the surplus towards the extinguishment of his just demands against the said Gordon.

It also admits, that the said Gordon became embarrassed in his circumstances, and unable to pay the demands of the said Hobart, otherwise than as aforesaid, and supposes, that the \$1600 note was paid by means of a renewed note of the Warrens aforesaid, on the 19th of January, 1818, in part payment of the \$2124 note above-mentioned. It also alleges, that the said Hobart received in his life-time payment of the whole or of considerable parts of the said Pierce's and of the said Warrens' notes, and of the demand against Proctor, and \$600 of the demand against Sawyer; that the said Hobart received the full amount, paid by him, on the \$1600 note, and all damages therefor, and ought to have discharged the before-mentioned mortgagee for his security as indorser, and to have applied the balance to the payment of his other demands against the said Gordon; but that the said Hobart did not do so, but died without rendering any account in the premises. That the said Gordon, on the 18th of September, 1819, transferred his interest in the mortgaged premises to

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Joseph Welsh and Hezekiah Ayer ; that the said Welsh and Ayer, on the 5th of September, 1820, transferred this interest to William W. Thackard ; that the said Thackard, on the 9th of January, 1832, transferred his said interest to your Orator ; and that the plaintiff has become seised of the equity of redemption, and acquired all the rights of John Gordon, afore-said, in the premises. That after the death of the said John Hobart, Polly Hobart, his widow and devisee, the 3d of April, 1830, quitclaimed to Leavitt Hobart all the interest of the said John in the premises ; the said Polly having received the rents and profits thereof, from the decease of said John to the time of said conveyance to said Leavitt Hobart.

The Bill then states, that the plaintiff (the Orator) being desirous of redeeming the mortgaged premises, had requested of the said Polly and the said Leavitt, an account of what was justly due on the said mortgages, and also of the rents and profits of the said premises, received by the said Polly, and by the said Leavitt, and by the said John, during his lifetime ; and upon receiving the balance, requested them to deliver up the premises.

The Bill then charges, that the defendants, admitting a right of redemption as to the mortgage for the security of the \$1600 note, deny, that the said John Hobart was indemnified by the above-mentioned notes of the Warrens, Pierce, &c. ; and that the defendants assert, that the said John Hobart had other large demands against the said Gordon, to the payment of which he might justly apply any surplus received as above-mentioned ; all which the Orator denies, and says, that all accounts between them, excepting those stated as subsisting in this petition, were settled to the 9th of December, 1817 ; and whereas the said Polly pretends to hold, as executrix, a note of said Gordon for \$400, the plaintiff says, that the same was fully paid ; and that the said John Hobart received of the said Gordon a bill of sale of a store-house in Stroud-

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water, of the value of \$300, for the rent and worth of which the said Hobart ought to account. And it further charges, that whereas the said Polly and Leavitt set up, that the \$270, undertaken to be reserved as rent of the premises mortgaged for the \$3000 loan, was in reality so reserved, and on no other account, the Orator charges the contrary ; that it was, in fact, an exaction of usurious interest ; that any pretended agreement for the payment of it is void ; and that neither the said Gordon nor his assigns ought to be held to the fulfilment of it.

The Bill then prays, that the defendants may be holden to answer, and to produce books and accounts, and for re-possession of the premises, and for further and general relief.

The condition of the bond of defeasance (by which the conveyance of the 25th of November, 1814, being absolute in its terms, became a mortgage) was in the following terms :

The condition of the above obligation is such, that, whereas the above-named John Gordon has conveyed to the said John Hobart certain real estate, viz. a certain lot of land situated in the town of Westbrook, and containing about forty-five acres, be it the same, more or less, as will more fully appear by said Gordon's deed to said Hobart, which deed bears even date with the presents ; which real estate is conveyed to said Hobart to secure the payment of three thousand dollars. Now, be it known, that if the said John Gordon, his heirs, executors, administrators or assigns, shall pay unto the said John Hobart, his heirs, executors, administrators or assigns, the sum of three thousand dollars, in three months after having due notice, and the same being demanded by the said Hobart, his heirs, executors, administrators or assigns, the same to be paid in gold or silver, then I, the said John Hobart, do by these presents bind myself, my heirs, executors, administrators or assigns, in the penal sum aforesaid, to give to the

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said John Gordon, his heirs, executors, administrators or assigns, a good and sufficient deed of conveyance of the within named premises, which if well and truly executed and delivered to the said Gordon, his heirs, executors, administrators or assigns, then the within written obligation to be void and of no effect ; otherwise to remain in full force and virtue.

JOHN HOBART.

The lease referred to in the bill, was in the form of an ordinary lease, for the term of one year from Nov. 25th, 1814, yielding and paying rent of 270 dollars for the said year ; and the same sum for each and every year the said Gordon should occupy or improve the same ; and the lessee promised to pay the rent in two equal half-yearly payments, one on May 25th, and one on November 25th.

The plaintiff having died, a bill of revivor was filed in October, 1835, on behalf of his heirs ; and to that is added, at the May Term, 1836, an express waiver of any objection to the \$3000 mortgage, on the score of usury : with an offer to fulfil the conditions, so far as they have not been performed, as the Court may direct.

The answer having been put in, and evidence taken, the cause came on for a hearing at the October Term, 1836, and the proceedings had thereon are fully stated in 2 Sumner's Reports, p. 402 to 409.

The cause now came on at this term to be heard upon the Master's Report, and the exceptions taken thereto by the parties.

The Master's Report was as follows :

In Chancery.—Charles Gordon and others, plaintiffs ; Leavitt Hobart and Sally Hobart, defendants.

In pursuance of the order of this honorable Court made in

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the above cause, October Term, A. D. 1836, and a commission issued thereupon, bearing date April 1st, 1839, by which it was referred to me, as a Master in Chancery, according to the bill of complaint of the said plaintiffs, and the respective answers thereto of the said defendants, in relation to the use and improvement of certain real estate therein set forth, to take an account of the rents and profits thereof, and to report what is due upon the footing of all and each of the mortgages set forth in the said bill of complaint, making all due charges against, and all due allowances to, the defendants, I have caused the parties aforesaid to appear before me on several set days by their respective solicitors, and have examined their several accounts and evidence, and do thereon report as follows :

1. On the mortgage made by John Gordon to John Hobart, dated November 25th, 1814, I find to be due as follows :

Principal,	\$3000
Interest, 1 year, 47 days,	203.50
	<hr/>
	\$3203.50
Deduct endorsement on Hobart's lease } to Gordon, January 11th, 1816, }	270
	<hr/>
	\$2933.50
Add interest, 1 year 47 days,	199.33
	<hr/>
	\$3132.83
Deduct endorsement on the lease, Feb- } ruary 27th, 1817, }	270
	<hr/>
	\$2862.83
Add interest to October 1st, 1839, 22 } years, 7 months, 4 days, }	3881.02
	<hr/>
	\$6743.85

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				\$6743.85
Also add for repairs,				
1819. Fencing stuff, as per ledger, p. 79,	\$33.20			
1821 & 1822. Daniel Lombard, labor,	\$54.75			
Materials, shingling and other				
repairs, as per ledger,	73.36	\$128.11		
1831. Tristram C. Stevens, labor,	2.25			
Materials,	15.54	17.79		
Parker & Stevens,	\$10			
Chapman & Chesley,	13.13	23.13	202.28	
				\$6946.08
Deduct produce and sundries, delivered,				
as per order, on Charles Gordon,				
Nov. 3d, 1819,	\$159			
Less	31.70	\$127.30		
Rent of mortgaged premises, exclusive				
of taxes, paid by Hobart from April				
1st, 1821, when possession was taken				
by John Hobart,				
House and garden,	\$ 75			
15 acre lot at Stroudwater,	100			
45 acre lot at Cape Elizabeth,	10			
	\$185			
per annum, amounting in 18 years, to				
April 1st, 1839,		\$3330.00		
And from April 1st, 1839, to October 1st,				
same year, 6 months,				
House and garden,	\$ 37.50			
15 acre lot,	100			
45 acre lot,	7.50	\$145.00		
Waste on the Stroudwater property,				
viz., garden wall and fences,	\$50.00			
Waste on the 45 acre lot at C. E.	\$310			
Cutting wood, and for trees cut				
for mill logs, estimated at	50	\$360.00	\$410.00	4012.30
				\$6083.78

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The reservation of \$270 rent of the premises having been stated in the bill to be in lieu of interest, and at the rate of 9 per cent. on the principal, I have thought it correct to allow interest from the date of the mortgage at 6 per cent. per annum, as above stated; though the payment of interest was not stated in the bond of defeasance. The lease is of the same date with the deed and defeasance, and assumed by me to be part of the same transaction, and to have been given with the intent mentioned in the plaintiff's bill; and it appears to me to be more equitable to calculate the interest at 6 per cent. than to charge the plaintiffs with the whole rent expressed in the case. Should I be incorrect in this assumption, and it should become necessary or proper for me to report as to the time when the first evidence of an actual demand appears, I would further state, that I infer from the other evidence, that a demand was made November 3d, 1819, the debt being then partly paid, as above stated, which inference is grounded upon the exhibit No. 18. Also that possession was taken in April, 1821, on all the mortgages in the case, as stated in the answer of Leavitt Hobart. I have made no rests since February 17th, 1817, because I have not found that the rents and profits have at any time been equal to the amount of interest accrued at the time they were received.

2. It appears from the first deposition of Levi Cutter, that the note of \$1600, dated November 24th, 1817, was applied as payment of the debt secured by the deed and defeasance, conditioned for the payment of \$1600, dated November 27th, 1815; and from this I infer, that both securities were for the same debt.

This result is confirmed by the fact, that the plaintiffs produce in their own custody the series of notes for the same amount, from the note dated November 27th, 1815, to a note discounted as for the renewal of a note in the same series June 9th, 1817, inclusive. The admission of this series of

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notes is objected to by the defendants, because the notes were not among the papers previously exhibited to the Court. If the admission of them is irregular, it may be proper for me to add, that I view them as having operated as cumulative evidence, and am not aware, that the result would have been different, if they had been entirely excluded.

I have, therefore, inferred, that the second mortgage, or the deed and defeasance, dated November 27th, 1815, is fully satisfied; and it appears by the admission of the parties, that no rents and profits have ever been received from this source by the defendants, for which they should be accountable in this action, the premises having been covered by a prior unredeemed mortgage to a third person.

3. It also appears from the deposition of Levi Cutter, that the note of John and Nathaniel Warren for \$1600, dated January 19th, 1818, discounted at the Cumberland Bank, was received by the bank in payment of the debt secured by the note of \$1600, given by John Gordon to John Hobart, dated November 24th, 1817, after several renewals of the same; and from the deposition of Nathaniel Warren, taken in connection with the memorandum under seal, dated February 17th, 1817, given by John Hobart to John Gordon, and the note for three thousand dollars from the said Gordon to the said Hobart, and the said Gordon's deed to the said Hobart of the Conant mill and privilege, the two last papers also bearing the same date of February 17th, 1817, I infer that the note for \$1600, dated November 24th, 1817, purporting to be secured by the mortgage of that date, was in fact paid to the Cumberland Bank from the funds of the said John Gordon, held in trust for him by the said John Hobart.

From these facts the conclusion is drawn that the third mortgage was fully paid on the 19th of January, 1818, by the note of John and Nathaniel Warren, and that all the rents

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and profits of the real estate included in the said third mortgage should have belonged to the said John Gordon.

I might have found more difficulty, notwithstanding the direct evidence in the case, in arriving at a result at first view somewhat questionable, did it not appear probable from the transactions here alluded to, as well as other circumstances of the case, that there was a species of trust and confidence between the parties, leading to anomalies in the apparent transaction of their mutual business, which, whilst it may have been prejudicial to the legal rights of creditors of the mortgagor, was at the same time not altogether safe for the parties directly concerned.

If the plaintiffs may recover in this action for the rents and profits of the estate covered by the third mortgage after the debt has been paid, I consider the fair occupation rent of the seventy-five acre lot at Cape Elizabeth to be twenty-five dollars a year, and of the twenty acre lot, five dollars a year, exclusive of taxes; that is to say, —

18 years from April 1st, 1831, at \$30,	\$540	
From April 1st, 1839, to Oct. 1st, 1839,	20	\$560
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To this amount is to be added for trees cut, and other injury to the premises in the nature of waste on the 75 acre lot, at sundry times,	\$525	
Amount received for damages for a road over the same in 1834,	60	
Waste on the 20 acre lot,	30	615
<hr/>		<hr/>
		\$1175

It was admitted at the hearing before me, that Jesse Gordon, the late plaintiff in this action, filed a complaint in the District Court of the United States for an injunction against Leavitt Hobart, one of the defendants, on account of waste

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alleged to be committed and continued by the said Leavitt on the real estate included in this mortgage, and that a citation was thereupon issued by the Hon. Ashur Ware, Judge of said Court, on the tenth day of December, 1834, returnable on the 13th day of the same December, and served upon the said Leavitt; that there was a hearing of the parties pursuant thereto; and that the process was afterwards discontinued in pursuance of an arrangement between the parties; but that no record of the proceedings exists.

It is also proved that some of the waste above mentioned was committed after the discontinuance of the said proceedings, but not to any very considerable extent.

4. On the whole view of the case, I cannot come to the result, that the avails of the two notes, signed by Josiah Pierce, dated November 24th, 1815, amounting to \$900 besides interest, nor of the note of J. and N. Warren for \$876, dated December 9th, 1817, all of which notes were pledged for the security of John Hobart, on account of a note or notes for \$1600, though it is in evidence, that the said sums were paid to the said John Hobart, being securities received by him of the said John Gordon, and that it does not appear, that they were applied to the above mentioned debt of \$1600, are therefore to be presumed to be applicable to the mortgage for three thousand dollars, dated November 25th, 1814. The second deposition of Levi Cutter, and other evidence in the case, disclose other pecuniary transactions between the parties, leaving such an inference quite uncertain, and such as, considering the plaintiffs also merely in the place of assignees of the mortgagor, and after the decease of the original mortgagee, has induced me to leave these notes out of the case, so far as they are urged as proving part payment of the first mortgage of \$3000. It would even be easier to suppose, that the two mortgages for \$1600 were independent on each other, and both in full force at the same time, and that all the above

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payments should be directly applied to one or the other of them.

5. For the like reasons, the sums referred to in the note of September 10th, 1816, given by the said John Hobart to the said John Gordon, being \$344.27 cents, — the sum of \$500 appearing by the deposition of Levi Whitman to have been collected of Sawyer and Webb, the balance of J. and N. Warrens' notes, being \$524, and the \$556 collected on S. A. Proctor's mortgage, are left out of the calculation, not being specified as applicable to any particular debt or debts. If the Court find me wrong, the error can be easily corrected in the statements, as the sums are already ascertained, and they are proved to have been paid to the said John Hobart from securities or funds received by him of the said John Gordon.

6. The parties agreed, before me at the hearing, that I should consider the subject of waste as affecting all or any of these mortgages, so far as I legally might do, if the same had been expressly mentioned in my commission.

Having been requested by the solicitor for the defendants to report, to whom the waste is chargeable as between the defendants, I find that all the waste, which has been proved in the case, was committed by or under the defendant Leavitt Hobart. What proportion of the same was committed by him before he became the assignee of the mortgages, is not distinguishable by the proof; and it was not particularly inquired into, it being understood by me, as admitted by the parties, that such inquiry would not be material in this suit.

7. In the above results nothing is allowed to the mortgagees for repairs on the fences enclosing any of the premises, except one item, amounting to \$33.20 cents, which was charged on John Hobart's ledger, exhibited in the case, in 1819, inasmuch as the same have been suffered to go to decay, and in some instances have been removed by the tenant.

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The occupation rent, as charged, is predicated upon the profit, which might have accrued under ordinary attention to the forms and the common usages of husbandry, without requiring outlays for new materials on the part of the tenant, and the mortgagee has the benefit of the calculation without charging the tenant with the fences, the decay of which in the main is attributable to time. If the fences had been kept in repair, a corresponding deduction would have been made from the occupation rent for the new materials necessary in making such repairs. I have, therefore, thought, that justice would be done to the parties by omitting the subject on both sides of the account, the state of the evidence not authorizing precise statements upon this point.

8. The estimates have also been made upon the supposition, that the taxes were paid by the tenant in possession. The evidence of the taxes was exhibited in the gross, and in one instance, that of the property in Cape Elizabeth, property belonging to the separate mortgages was included in the same tax; and, as in the matter of fences, by expressing any estimated amount as paid for taxes, I must have also made a corresponding addition to the amount of rents and profits on the other side of the account.

9. John Hobart's leger, No. 2, previously exhibited in Court, having been mislaid, or rather overlooked, was not present at the hearing before me, but was afterwards found and placed in my hands by the consent of parties. I have made no allowance to either party from the same that are not found under the head of "Gordon estate," folio 79. My attention was also directed by the solicitor of the plaintiffs to the account of "Joshua Webb," folio 4. I accordingly examined the account last mentioned, but with no result affecting either party in this cause. There being no evidence at all connecting the entries there contained with the case before me, I

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thought the dates of the entries alone sufficient to show their irrelevancy.

10. The solicitors for the plaintiffs having requested me to report, whether there was any proof of a demand of \$3000, according to the terms of the bond for the payment of that sum, I further add, that the only evidence of a demand, except what arises from the receipt of the rents and the other offsets stated in the foregoing account relating to the mortgage first mentioned for the said sum of \$3000, is, that Jonathan Tucker, a witness for the defendants, testifies, that in the Spring of 1818 or 1819, he went with John Hobart, deceased, to demand money of John Gordon at Stroudwater, that the said Hobart did then demand money of the said Gordon. The said testimony of the said Tucker is credited by me, and is made part of my report of the case.

(Signed)

EBEN^r. EVERETT.

The plaintiffs filed the following exceptions :

First Exception.—For that it appears in and by the said report, that the said Master, in taking an account of what was due upon the footing of the mortgage made by John Gordon to John Hobart, dated November 25th, 1814, to secure the payment of the sum of 3000 dollars, according to the terms and conditions of the bond of defeasance therewith made, has charged and allowed interest thereon, as appears by the statement of said account : whereas, by the terms and conditions of the said bond, such interest should not have been charged or allowed : or, at most, the said Master should have only made an equitable allowance of simple interest against the allowance made in favor of the plaintiffs, for rent received upon and according to the terms of the lease of the same premises, mentioned in the bill, and for the same period of time only ; and that only in case the said contract of lease

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should be taken and deemed as a cover for usurious interest therein contained.

Second Exception.—For that it appears, that the avails of three notes, viz. two signed by Josiah Pierce, dated November 24, 1815, one for \$500 and one for \$400, making \$900, and another of J. & N. Warren, for \$876, dated December 9, 1817, with interest, which notes were made and pledged for the security of the said John Hobart, on account of the sum secured by the mortgage, to secure the payment of 1600 dollars; and the amount thereof, with interest, was actually paid to the said John Hobart, and not allowed by the Master, in payment of the said \$1600 mortgage; nor in any manner for the benefit of the plaintiffs.

In which respects, the said plaintiffs except to the said Master's report, and humbly appeal therefrom to the judgment of this honorable Court thereon.

The defendants filed the following exceptions :

The defendants except to the Master's report, as erroneous in the following particulars, viz :

1st. The rents and profits allowed by the Master are much greater than they ought to have been.

2d. No allowance ought to have been made by the Master for waste; and if the defendants were chargeable for any thing on that account, the amount allowed by the Master is much greater than it should have been.

3d. The Master has allowed \$60 for damages recovered for the laying and making a road through the seventy-five acre lot, in Cape Elizabeth, but has allowed the defendant nothing for making the fences on the said road, which were proved to have cost \$45.

4th. The Master has allowed nothing for taxes paid by the

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defendants on the mortgaged premises, which were proved to amount to a large sum, viz. \$500.65.

5th. The Master has predicated his report on the ground, that the mortgage of November 27, 1815, and that of November 24, 1817, are for the same debt, and not separate and distinct, whereas they are, in fact, for different and distinct debts, and ought to be allowed by the Master in his report.

6th. The Master does not state the facts, on which he makes some allowances in his reports, and refuses to make others.

7th. The Master has erroneously allowed the note of November 24, 1817, as paid out of the funds of said Gordon, when the same was paid by the said Hobart out of his own funds, as clearly appears by the evidence in the case, and ought to be allowed to the defendants with the interest thereon.

8th. The amount allowed for repairs on fences is far short of the amount which ought to have been allowed.

For the foregoing reasons, the defendants object, and except to said Master's report, and appeal therefrom to the judgment of the honorable Court thereon.

The case was now argued upon the exceptions, by *Charles S. Davis* (with whom were *Willis* and *Fessenden*), for the plaintiffs, and by *S. Longfellow* and *S. Longfellow, Jr.* for the defendants.

STORY, J. The first point, naturally suggested for consideration in the case, is, whether the question of the supposed waste was properly entertained, or could be entertained, by the Master, even with the consent of the parties. I am clearly of opinion, that it was not properly cognizable by the Master, nor, indeed, in the cause. In the first place, there is

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no charge in the bill of any waste, and, consequently, no answer to it; and, therefore, the matter was in no sense in issue between the parties; and the Court have no authority, by consent, to entertain questions, which are not properly brought before it for consideration by any fit judicial proceedings. In the next place, the reference to the Master conferred no authority upon him to institute any such inquiry, even if the matter had been charged in the bill; and, consequently, he had no authority to act in the premises, or to make any report thereon. The consent of the parties could not confer upon him any authority to examine into matters *dehors* his commission; and the whole proceedings, as to the waste, were, therefore, irregular, and *coram non judice*. If the matter had been properly before the Court, and a more enlarged authority in the Master was required, it should have been sought by a proper application to the Court in the first instance. In the next place, it is perfectly clear, that, as the original plaintiff, Jesse Gordon, sought relief as assignee of the mortgagor (John Gordon), no waste, which took place antecedently to the assignment to him, could properly, under any circumstances, be inquired into, in any suit brought by him. That waste, if there was any, was no wrong done to him; and the mortgagee (Hobart) was not accountable therefor to him. Now, it is apparent from the evidence in the cause, that the asserted waste in a great measure took place before the assignment to Jesse Gordon. For these reasons, all allowances on account of waste must be struck out of the report.

Let us, then, proceed to the consideration of the exceptions taken by the plaintiff to the Master's report. They are two. (1). The allowance of the interest to the mortgagee upon the \$3000 mortgage. (2). The appropriation of the money received by the mortgagee upon the two notes of Pierce, one for \$500 and one for \$400; and upon the note of J. & N. Warren for \$876. My opinion is, that the Master has prop-

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erly made the allowance of the interest. The argument against it mainly rests on this ground ; that interest is not stipulated for in the contract, and, therefore, until a demand was made of the principal, and a default of payment thereof, no interest could accrue due. But the argument is not sustained by the facts or by the structure of the bill. The latter insists, that the original contract was upon an usurious consideration, and that thereby an interest of nine per cent. was intended to be reserved ; and that the lease to the mortgagor, at the stipulated rent of \$270 per annum, was but a collusive arrangement to accomplish the purpose. Now, if this be correct, then it establishes beyond controversy, that the \$3000 was originally agreed to be a loan on interest, and, therefore, the plaintiff, who seeks relief against that usury, is entitled to it only upon doing equity ; in other words, the only relief, to which the original mortgagor would have been entitled under such circumstances, would be to have the rate of interest cut down to the legal rate of six per cent., which is precisely what the Master has allowed. The plaintiff, as assignee, is certainly not entitled to be placed in a better situation than the original mortgagor. If he is entitled, as assignee, to any relief against the usury (a point, upon which I give no opinion), it must be upon his placing the mortgagee in precisely the same predicament, as to interest, as if he were the original mortgagor. The question of usury is now waived by the plaintiffs ; but that does not, in the slightest manner, vary the rights of the parties, as to lawful interest.

But it is plain, that the original parties did contemplate the payment of interest upon the loan *ab origine*. I agree with the Master in thinking, that the lease was but a mode of securing an illegal interest, that of nine per cent. ; and that the lease and the mortgage are to be treated not only as contemporaneous acts, but as a part of one and the same transaction. As long as the lease continued and the rent was paid, it was

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an usurious interest, which this Court would not sanction. But when that ceased, and the mortgagee took possession, it was manifest, that interest, according to the original contract, was to be allowed ; and, the most, that can be said, is, that the interest in equity ought to be cut down to the legal interest during the whole period, which has been actually done by the Master. Besides ; if it were material (which, in the view, which I take of the case, it is not), the entry of the mortgagee into possession must be deemed an entry after a demand of the payment of the principal, and a default on the part of the mortgagor, with a view, perhaps, to a foreclosure ; but, if not, at all events to secure his interest and other rights under the loan. There is also the positive evidence of Jonathan Tucker, stated and credited by the Master, that the mortgagee, in the spring of 1818 or 1819, went to the mortgagor and demanded the payment of money from him ; and this may well enough be deemed to be a demand of the mortgage debt, then due, if it were necessary to sustain the claim of interest. I place no stress upon it, because the other circumstances are sufficient, in my judgment, to establish the claim. Upon the whole, for the other reasons already stated, I am of opinion, that the right to lawful interest attached ; and the Master has, therefore, properly allowed it ; and the exception on this point is over-ruled.

As to the other exception, there is no doubt, that the money was actually received upon the Pierce notes and the Warren note by the mortgagee. But, how the money received thereon was actually applied, we have no means, after so great a lapse of time, of ascertaining. The money was originally intended to be applied to the discharge of the \$1600 mortgage. It was not so applied. But there were other transactions between the parties of a secret and confidential nature, to which it might have been applied, and to which, in the opinion of the Master, formed after sifting all the circum-

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stances, it was probably applied. There is enough disclosed in the case to show, that there was a designed obscurity and concealment of the parties of the business transactions and arrangements between them. And there is strong, if not vehement, reason to presume, that the real object was to cover up the property of the mortgagor, so that it should not be reached by his creditors ; and, therefore, a cloud was thrown over every transaction, and money, apparently intended for one object, might have been studiously held out as actually applied to another. At least, there is enough in the case to lead one to doubt, whether the money received on those notes was not actually applied, by the consent both of the mortgagor and mortgagee, to other of their private transactions.

It is sufficient, however, to say, that no appropriation was ever made by either party of the proceeds of either of these notes, to the payment of the \$3000 mortgage. What, under such circumstances, is the rule promulgated both by Courts of Law and Courts of Equity ? It is, that, where money is paid by, or received for, a debtor, by his creditor, the debtor has a right to make the appropriation to what purpose he pleases. If the debtor makes no appropriation, then, the creditor may apply it to the satisfaction of any demand, which he has against his debtor, at his own pleasure. If neither party make any such application, then, if there are various debts due to the creditor, the Court will make the application according to its own view of the law and equity of the case, under all the circumstances.

But this right of appropriation is one strictly existing between the original parties ; and no third person has any authority to insist upon an appropriation of such money in his own favor, where neither the debtor nor the creditor have made or required any such appropriation. What claim can an assignee of the mortgagor have to insist, that money in the hands of the mortgagee, belonging to the mortgagor, shall

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be applied in discharge of the mortgage, unless such application of it was clearly contemplated by the original parties, and the assignee has made the purchase with the understanding, that the money should *pro tanto* go to the extinguishment of the mortgage? The maxim in such a case ought to prevail, *Res, inter alios acta, alteri nocere non debet*; and, I may add, that, in such a case, *Nec prodesse potest*. It would be inequitable to allow an assignee of the mortgagor to make a profit by an appropriation of the money of the mortgagor in the hands of the mortgagee, which neither of them ever contemplated appropriating to the extinguishment *pro tanto* of the mortgage.

But it is sufficient to say, that, in the present case, there is no evidence, that the money was not actually appropriated at or after the time, when it was received, by the original parties, to other purposes; and, considering the great lapse of time, and the obscurities hanging over all the transactions, it would be unsafe for the Court not to presume, that the money was applied to other purposes; especially, as there were no subsequent proceedings between the parties, which could lead the Court to any other conclusion. The Master's judgment upon this point seems to me to be entirely correct, and founded upon just reasons.

Then, as to the exceptions on the part of the defendants. The first is to the sum allowed for the rents and profits, which, it is asserted, is too large. But the Master has stated all the circumstances, and it seems to me, that they sufficiently establish the propriety of the allowance. The second, respecting the allowance for waste, has been already disposed of. The third is for the non-allowance of the \$45, expended for fences by Hobart. But that the Master has fully explained. In fixing the occupation rent, the Master took into consideration the subject of the fences, and made the rent less by what ought to be allowed the tenant for keeping the fences in

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proper repair. The like answer may be given to the fourth exception respecting taxes. A suitable deduction was made from the rent by the Master, founded upon the supposition, that the tenant paid the taxes.

The fifth exception is founded upon the notion, that the two mortgages of \$1600 were given for distinct and independent debts; and not for one and the same debt. But upon the statements made by the Master, it seems to me very clear, that they were both given as securities for one and the same debt. It appears from the statement of the Master, that there was a prior unredeemed mortgage on the premises, which were originally mortgaged for the payment of the \$1600; and this fact alone, independent of the other very strong circumstances in the case, would lead one to the conclusion, that the second mortgage was taken to supply the defective security by the first. But, taken in connexion with the other circumstances, the conclusion seems almost irresistible, that they were both for one and the same debt.

The other exceptions require no particular notice. The seventh is disposed of by the considerations already suggested under the preceding head. The sixth and eighth are too vague and general to be of any validity, and, therefore, must be dismissed from the view of the Court.

Upon the whole, I am of opinion, that the exceptions filed by both parties ought to be over-ruled; and that the Master's report ought to stand confirmed in all the particulars, excepting the allowance for the supposed waste, which is to be struck out; and, being thus reformed, the report is to stand confirmed accordingly.

Decree accordingly.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

NEW HAMPSHIRE, MAY TERM, 1842, AT PORTSMOUTH.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. MATHEW HARVEY, District Judge.

PAUL LANGDON AND ANOTHER, EXECUTORS OF ELIZABETH
SEWALL v. WILLIAM GODDARD AND ANOTHER.

In suits in Equity, the proofs must, to be admissible, be to some allegations or facts charged in the Bill or Answer; and thus put in issue by the parties.

Therefore, where the Bill set up a title under a will, and yet, it relied upon a title under certain codicils thereto, which were not alluded to in the Bill; *It was held*, at the hearing, that the Bill was fatally defective.

The State Courts have exclusive jurisdiction over the Probate of wills and codicils; and the Probate thereof in the proper State Court is conclusive.

Where a codicil is asserted to have been obtained by fraud, and afterwards to have been revoked, if the plaintiff mean to rely upon the codicil and its revocation, as a proof of fraud, in the defendant, and also to rely upon its being either destroyed by the defendant, or to be in his possession and suppressed, it is indispensable, that the Bill should allege the execution of the codicil and its revocation, and the fraud of the defendant in obtaining it, and also that he has destroyed it, or has it in his possession, and require a discovery of the facts, and of the contents of the codicil, otherwise these points cannot be used as evidence in the cause.

An answer, responsive to the allegations and charges in the Bill, will pre-

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vail in favor of the defendant, as evidence, unless it be overcome by the testimony of two witnesses, or of one witness and corroborative circumstances.

BILL in Equity. The bill alleges, that the complainants were appointed executors of Elizabeth Sewall by her will, dated July 25th, 1834. That she died Sept. 8th, 1838 ; that the said Elizabeth, by her will, and the codicils thereunto annexed, devised all her estate to certain devisees therein named, which will was proved, on December 3d, 1838, and letters testamentary were granted on May 6th, 1839. That on July 10th, 1839, the executors filed in the Probate Court for the County of Rockingham, and State of New Hampshire, copies of the said Will and Probate, and gave bonds agreeably to the laws of New Hampshire ; by means of which premises, all the property of the said Elizabeth vested in the said executors.

That the said Elizabeth, being old and infirm, did, on or about October 1st, 1830, intrust to her nephew, William Goddard, of Portsmouth, the sum of \$500, for him, as her agent, to loan the same for her benefit ; and that Goddard did, on October 25th, 1830, loan the said \$500 to John Floyd, of Kittery, County of York, and State of Maine, and took Floyd's note for that sum, of that date, signed by him, and by Cushman and Goodrich, as his sureties, payable to the said Elizabeth or order in one year, with interest semi-annually ; and to secure the said note, he also took a mortgage from the said Floyd, to the said Elizabeth, of his house in Kittery, the interest of which, when it became due, was to be received by the said Goddard, which, with the note and mortgage, he was to hold as her agent, subject to her order.

That the said Elizabeth, on or about December 1st, 1834, intrusted to the said Goddard, her agent, the sum of \$3000, to loan for her benefit, and he, on January 1st, 1835, loaned the said \$3000 to Theodore J. Harris, of Portsmouth, and

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took therefor, the note of the said Harris, of the date aforesaid, payable to the said Elizabeth or order in eighteen months, with interest semi-annually ; to secure which, he took from the said Harris, to the said Elizabeth, a mortgage of the mansion house of Harris, situated in the said Portsmouth.

That the said Goddard, for several years, the precise time being unknown to the complainants, had the management of the said notes and mortgages, received the interest, and accounted to the said Elizabeth for the same.

That on January 29th, 1838, the said Harris died at sea, and the said Mary M. W. Harris, was appointed his administratrix. About this time, the said Goddard returned the said notes and deeds to the said Elizabeth, the same having been, for some cause unknown to the complainants, endorsed by the said Elizabeth in blank.

That on August 13th, 1838, the said Elizabeth delivered to the said Goddard the said notes and mortgages against the said Harris, and the said Floyd, in order that the said mortgages should be foreclosed, for the purpose of enforcing the payment of the said notes for her benefit ; and on September 8th, 1838, she died, leaving them in the said Goddard's possession, and as part of her estate devised, as aforesaid.

That the complainants have repeatedly requested the said Goddard to deliver to them the said notes and mortgages, and they hoped, that no dispute would have arisen, but that the said Goddard would have delivered to them the said notes and mortgages, that they might have administered upon them as the estate of the said Elizabeth. But the said Goddard refuses to comply with the said request, but sometimes pretends, that the said Elizabeth gave him the said notes and mortgages, and sometimes, that he paid her for them ; whereas, the complainants charge the contrary to be true.

The bill prays, that the said Goddard may be decreed to give up to the complainants the said notes and mortgages,

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and render a true account of his agency, and pay over what may be due, and that the said Mary M. W. Harris may be restrained from paying the amount due on the said mortgage, from Theodore J. Harris, to any person other than the complainants, and for further relief.

The answer of William Goddard, was in substance as follows :

It admits the making of the Will by Elizabeth Sewall, her death, the approval of the Will by the complainants, as her executors, and the filing of a copy of the same in the Probate Court for the county of Rockingham, as set forth in the bill.

It then alleges, that Elizabeth Sewall was the defendant's aunt on his mother's side, that he ever regarded her with great affection since his mother's death in 1807, and that she so regarded him, and placed great confidence in him. That he commenced mercantile business in 1828, and soon opened an account current with the said Elizabeth, which account was regularly kept, and from time to time balanced, and finally closed in Sept. 1835 ; and that their transactions after that time were few, and balanced at the time. That he frequently acted as her agent in collecting dividends for her, and occasionally in investing money for her, for which he never received any compensation, but paid her interest, when her money remained in his hands for any length of time.

That on or about October 25th, 1830, on the application of Messrs. Cushman & Goodrich, he loaned, on behalf of the said Elizabeth, \$500 to John Floyd, and took his note, with Cushman & Goodrich for sureties, payable to the said Elizabeth or order in one year, with interest semi-annually ; and also a mortgage, from the said Floyd to the said Elizabeth, of his house in Kittery, which note and mortgage he soon after delivered to the said Elizabeth.

That on April 23d, 1834, by his note of that date, he was

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indebted to the said Elizabeth, \$3434, and wishing to make a payment on the same, and securely to invest it for the said Elizabeth, he loaned to the said Harris \$3000, part of the said \$3434, on January 1st, 1835, and took Harris's note therefor, dated on the said January 1st, payable to the said Elizabeth or order in eighteen months, with interest semi-annually, and to secure the same, he took a mortgage from the said Harris to the said Elizabeth, of his house in Portsmouth, which note and mortgage was by him soon after delivered to the said Elizabeth, and by her received in part payment of his said note for \$3434, the balance of which he paid on August 29th, 1835.

That the said notes remained in the possession of the said Elizabeth, from about the time of their several dates, until November 9th, 1836, except that the note of Harris was, on or about August 16th, 1836, sent to him by the said Elizabeth, that he might endorse thereon \$200, which was then paid by Harris, received by Goddard, and by him paid to the said Elizabeth about that time, when he delivered the note to her. That the first endorsement on the said note was either deducted from the amount loaned to Harris, or by him paid to Goddard, and by him paid to the said Elizabeth. That all the amounts endorsed on the note of the said Floyd, previous to November 9th, 1836, were paid by Cushman & Goodrich to Goddard, for which he gave his receipt, as attorney of the said Elizabeth, which sums were by him paid over to the said Elizabeth upon his first visit to York, and endorsed on the said note, while the same was in the possession of the said Elizabeth.

That on November 9th, 1836, he saw the said Elizabeth, at her house in York, and they then and there settled and adjusted all matters between them, and since then, no new matters have arisen between them, except such as were entered into on that day, and except, that he has occasionally col-

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lected dividends for her, which he has paid over to her, excepting some \$16, which, by mistake, he has omitted to pay over to her.

That on November 9th, 1836, he sold and transferred to the said Elizabeth, twelve and a half shares in the Portsmouth Manufacturing Company, and also, all his interest in a loan by him to the said Company of \$625; also two shares in the New Market Manufacturing Company; all of which were estimated to be of the value of \$5200, and received from the said Elizabeth, in payment, the said notes of John Floyd and of the said Harris, which she then endorsed, and delivered to him, and the mortgage deed from Floyd to her was then delivered to him by her, the note of Floyd being wrapped up in the said deed, together with other notes, amounting to \$500; and neither any of the said notes, nor the said deed, were ever after in the custody, or under the control, of the said Elizabeth; but the mortgage deed from the said Harris to her, not being with the note, or not being readily at hand, was not then delivered by her to him. And that, as the property, conveyed by Goddard to the said Elizabeth, was considered to be of greater value, than the notes transferred and delivered by the said Elizabeth to him, it was agreed, that Goddard should have the right within any reasonable time, if he thought proper, to re-purchase the property by paying to the said Elizabeth the amount of the said notes; but it was distinctly understood, that if he preferred to keep the notes, she was not to call upon him for them or their contents.

That previous to August 13th, 1838, the property of the Portsmouth Manufacturing Company was nearly all destroyed by fire, and the shares, by reason thereof, were much reduced in value. That previous to August 13th, 1838, Goddard had met with many and severe losses, by which he lost nearly all the property he had before that time possessed. That on the said August 13th, 1838, he being on a visit to his said aunt,

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the said Elizabeth, and, in conversation with her, introduced and mentioned the loss of the Portsmouth Manufacturing Company by fire, he also enumerated his own losses, and said, that he much regretted the said losses on her account, and that if he were able, and she should request it, he should, even then, feel morally bound to make good to her her loss, and repurchase the property he had conveyed to her for the said notes ; but that, in consequence of his losses, he was totally unable so to do. To which she replied, " Keep the notes, and here is the mortgage, which belongs to them," or words to that effect, at the same time handing the said mortgage, from Harris to her, to him, from and by which, Goddard understood, that he was entirely freed and discharged from any obligation to repurchase the said property.

That after the said November 9th, 1836, the said Elizabeth never mentioned to Goddard the said notes and mortgages, or even alluded to them, except on the said August 13th, 1838, as before stated ; that the said Harris's mortgage was suffered by Goddard to remain with the said Elizabeth, until August 13th, because he had confidence, and fully believed, that she would, at any time, deliver it to him on his request.

That the complainants have at various times, and now do, claim the shares in the New Market Manufacturing Company, and shares in, and loan to, the Portsmouth Manufacturing Company, as property belonging to the estate of the said Elizabeth.

The answer denies expressly, and absolutely, that the said Elizabeth, on August 13th, 1838, or at any other time, delivered the said notes and mortgages of Floyd and Harris to him, to have them foreclosed, in order to enforce the payment of the said notes for the benefit of the said Elizabeth ; but that she delivered them entirely for his own use, and as his own property.

The answer admits, that the said Harris died at sea, and that Mary M. W. Harris was appointed his administratrix, as

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alleged in the bill, and that the complainants have requested him to deliver to them the said notes and mortgages, which he has always declined to do, claiming them as his own property.

The answer denies all combination, and prays that Goddard may be dismissed with his costs.

Mary M. W. Harris filed a separate answer, admitting the facts set forth in the bill, so far as they related to her, or to the said Theodore J. Harris, and as to the other facts, that she had no information or belief, other than what was set forth in the bill.

At the May Term, 1841, the complainants moved the Court, that Mrs. Harris pay into Court, or into some bank to the credit of the Court, the amount admitted to be due on the note and mortgage of the late Theodore J. Harris. The Court ordered the same to be paid into the Piscataqua Bank to the credit of the Court, and that Mrs. Harris be discharged from any further claim on the note and mortgage, and that she have her costs.

The defendant, Mrs. Harris, thereupon paid into Court the money due from her husband's estate, and all further proceedings against her were abandoned.

To the answer of Mr. Goddard, the complainants filed a general replication, and testimony was taken on both sides.

The cause was argued by *Goodrich & Hackett*, for the plaintiffs, and by *S. Greenleaf & J. W. Emery*, for the defendant Goddard.

STORY, J. As I understand the present case upon the bill, answers, and evidence, there is no small difficulty in acting upon it, owing to technical objections, which I do not perceive, how the Court is to overcome. The plaintiffs, who are citizens

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of Maine, claim in their character of executors of the last will and testament of Elizabeth Sewall, of York, in the same State, widow, deceased, dated the 25th of July, A. D. 1834. The will has been proved by the executors, both in the State of Maine, and the State of New Hampshire, in the regular Probate Courts of each State. The defendants are citizens of New Hampshire. So far, there is no difficulty, and the jurisdiction of this Court over the parties is clear and complete. But, then, the plaintiffs have introduced into the evidence other facts, upon which they rely to overcome the answer of the defendant Goddard. These facts are, that the testatrix, subsequently, on the 11th of July, 1838, executed a codicil to her will, (which has been duly admitted to Probate); that, subsequently, on the 20th of August, 1838, she executed another codicil to her will, which, however, she revoked by another codicil, executed by her on the next day, (the 21st of August); and that, on the same day, she executed another codicil, by which she revoked the appointment of the defendant Goddard, as her executor, (he having been appointed executor of her will, and continued as such by all the antecedent codicils), and substituted the present plaintiffs as executors. These two last codicils have, also, been admitted to Probate. But the revoked codicil of the 20th of August is not produced, nor is it even pretended, that notice has been given to the defendant Goddard to produce it, although evidence of its being in his possession is offered; and the contents are attempted to be proved by parol testimony. The object of introducing the evidence of the revoked codicil seems to be to show, that it was procured fraudulently, and by false suggestions, by the defendant Goddard, for his own benefit and advantage; and that it contained provisions incompatible with the defence set up by his answer.

Now, one of the difficulties, that meets us at the threshold of the case, is that not one of these codicils is, in any man-

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ner whatsoever, alluded to in the bill. The will of 1834, and that only, is referred to in the allegations of the bill; and as the allegations and the proofs must be coincident, and the latter are not admissible, unless they are charged, and put in issue by the pleadings, it is plain, that the Court can take no notice whatsoever of the codicils, which have been admitted to Probate. What makes the omission the more remarkable is, that the very title, upon which the plaintiffs found their right, as executors, to maintain the present bill, depends exclusively upon the last codicil executed by the testatrix. As to the revoked codicil, it is true, that, it having been revoked, it could not be proved in any Court of Probate. But, on the other hand, it is equally clear, that if the plaintiffs meant to found any claim upon it, or to use it as evidence, or to repel any title of the defendant under it, the bill ought to have stated its existence, and called upon the defendant to make discovery of its contents, and to state whether it was in his possession; and if he should make the discovery, then the instrument might be used as proof. If he should make none, and yet the possession could be traced home to him, or its destruction could be proved, then parol evidence would be admissible of its contents against him; and not otherwise.

In respect to the will and the codicils admitted to Probate, the exclusive jurisdiction, as to the Probate thereof, belongs to the State Courts of Probate; and we have no authority, whatsoever, to inquire into, or examine the validity thereof.¹ But, then, to introduce them in evidence, it is essential, that they should be set forth and charged as existing instruments in the bill. This has not been done; and, therefore, I do not see, how the Court can take any notice of their existence.

¹ See *Lear v. Armstrong* (12 Wheat. R. 169); *The King v. Inhabitants of Neatherhead* (4 Term, R. 258); *Price v. Dewhurst* (4 Mylne & Craig. 76, 80; *Tompkins v. Tompkins*, 1 Story R. 547).

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Now, striking these codicils, and the evidence appertaining thereto, out of the case, there is no sufficient evidence, upon which the plaintiffs can maintain their bill. The answer of the defendant, Goddard, (for there is no controversy as to the other defendant), wholly denies all the material allegations of the bill ; and, as it is responsive to these allegations, it must prevail, unless overcome by the clear and decided testimony of two credible witnesses, or at least by that of one, and other corroborative circumstances, equivalent to another witness. There is no such evidence in the case. On the contrary, the proofs introduced on behalf of Goddard, go strongly to fortify his answer ; and the conduct of the executors, since the death of the testatrix, in appropriating to themselves the shares in the Portsmouth Manufacturing Company, and the Newmarket Manufacturing Company, and treating them as the absolute property of the testatrix, coincides with the statements of the answer. It is true, that these facts are not decisive. But it is difficult to conceive, how these shares should have been transferred to the testatrix, and the notes of Floyd and Harris indorsed in blank, and delivered with the attendant mortgages to the defendant Goddard, unless they were designed, between Goddard and the testatrix, to be taken as a substituted security, or as an absolute transfer to her, for the amount of the debts due to her by Floyd and Harris, and by Goddard. At all events, I must say, that the case is involved in so much doubt, that there is no ground, upon which a Court of Equity is entitled to grant relief. It is never active in a doubtful case ; far less in a case, where the circumstances, so far as they go, support an answer responsive to the allegations of the bill, which, if well-founded, furnishes a complete and satisfactory defence upon the merits.

My judgment is, that the bill ought to be dismissed, with costs, but without prejudice.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MAINE, MAY TERM, 1842, AT PORTLAND.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon ASHUR WARE, District Judge.

STEPHEN H. CLEAVELAND

v.

FRANCIS O. J. SMITH.

IN the construction of written instruments, the intention of the parties is to be ascertained, not by parol evidence thereof, nor by mere conjecture, but by the application of certain rules of interpretation to the instrument itself.

Wherever there is a latent ambiguity in an instrument, as in the case of a mutual mistake in the descriptive words therein, the intention of the parties is to be collected from the instrument taken as a whole, and effect given thereto *cy pres*, and whatever is inconsistent therewith is to be rejected.

The general rule, in the interpretation of the descriptive words of deeds and grants, is, that courses, distances, admeasurements, and ideal lines, must yield to known and fixed monuments upon the ground itself, whether they be natural or artificial.

Where, in a grant of land from the Commonwealth of Massachusetts to the towns of Taunton and Raynham, the land was described as "beginning on the north line of the million acres at a yellow birch tree, six miles east from the south-east corner," &c. (the said birch tree being marked as a monument in the original survey of the land); whereas the said birch tree did not, in fact, stand upon the said north line, as sup-

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posed, but was so situated, that a gore of land was left between it and the said north line; *It was held*, that the said birch tree, and not the said north line, was to be taken as the boundary of the land granted.

THIS was a writ of entry, brought to recover a tract of land described in the demandant's writ, in which he declared on his own seisin, and a disseisin by the defendant within twenty years. The defendant pleaded *nul disseisin*, and on this plea issue was joined. The cause was tried before the District Judge (Judge Ware). At the trial, the plaintiff, to prove his title to the land in dispute, offered his deed from the Agent of the Commonwealth of Massachusetts, and State of Maine, of the land described in his writ, executed and bearing date Sept. 25th, 1834. The agency was admitted, and he contended, that the said tract passed to him by the said deed.

The defendant, to prove his title to the said tract of land, introduced a deed from the Commonwealth of Massachusetts to the towns of Taunton and Raynham, dated on the 31st day of January, 1820, of the following described tract of land, namely, "One half of a township of land, of the contents of six miles square, lying in the County of Somerset, as the same was surveyed by Thomas McKecknie, the 30th Nov., 1813, bounded as follows, viz., beginning on the north line of the million acres, at a yellow birch tree, six miles east from the southern corner of the township number three, in the first range of townships, north of William Bingham's Kennebec purchase, thence running east six miles on said million of acres north line to a yellow birch tree, within about half a mile of Moosehead Lake, thence north three miles, thence west six miles, thence south to the yellow birch tree begun at, containing eleven thousand five hundred and twenty acres." And this deed, he contended, on its southern boundary, covered all the lands to the north line of the million acres, (commonly called the Bingham purchase), and extending on that line the full length of six miles; and that the said deed

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to the towns of Taunton and Raynham being prior in date to the grant of Massachusetts and Maine, dated on said 25th September, 1834, Maine and Massachusetts had no lands, which could, on that day, be conveyed; but that the whole passed by the grant of Massachusetts to Taunton and Raynham on January 1st, 1820.

The million acre tract (the Bingham purchase) was located and surveyed in 1792, and the north line thereof was marked and distinguishable. The plaintiff contended, that the tract in dispute was not conveyed by the grant of the Commonwealth of Massachusetts to Taunton and Raynham, but remained in Massachusetts and Maine, on the 25th of Sept. 1834, when these two States conveyed the same to the Plaintiff; and he introduced testimony tending to prove, that the two yellow birch trees on the said grant of the 1st of January, 1820, were not, as originally fixed and marked on the face of the earth in the original survey, in said million acre north line; but were at a distance and to the north of the said line, and were in the line originally marked and surveyed as the south boundary of the Taunton and Raynham grant, and left, between the marked birch tree and the said million acre line, a strip or gore of land, which the said Commonwealth and State conveyed to the plaintiff by their grant aforesaid, dated the 25th day of September, A. D. 1834. And he contended, that inasmuch as the said two birch trees, marked as monuments in the original survey, did not coincide with the million acre north line, mentioned as part of the description in the said grant, the two birch trees established on the face of the earth, as monuments, must govern in fixing the boundaries of the said grant on the south line of the same; and that the strip or gore aforesaid passed to him by the said grant of September 25th, 1834; and to this effect the Judge instructed the jury.

The Judge was requested, by the counsel for the tenant,

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to instruct the jury, that if they were satisfied, that it was the intention of Massachusetts to grant, and of the towns of Taunton and Raynham to receive, according to the terms and language of the grant, viz., to the north line of the million acre tract, that they should find accordingly, notwithstanding there might be a discrepancy in the evidence, as to the actual running of the line of the said towns of Taunton and Raynham, or a variation, by mistake, in the marking of it. Which instruction the Judge refused to give to the jury.

And the Judge left it to the jury, to determine, from the evidence, whether the south line of the Taunton and Raynham half township was identical with the north line of the million acre tract, stating to the jury, that this was to be determined by ascertaining, whether the two yellow birch trees were, in fact, in that north line. If they were, then their verdict ought to be for the tenant; otherwise it ought to be for the demandant.

The jury found, that the said birch trees, referred to as monuments, and descriptive of the said grant, were not in the million acre north line; but were so situated, as to leave the strip or gore aforesaid between the said million acre north line and the south boundary line of the Taunton and Raynham grant, as located on the face of the earth, at the time of the original survey and location thereof.

The defendant produced the original plan of the survey and the laying of the said half township, granted to the towns of Taunton and Raynham, by Thomas McKecknie; and the plaintiff proved other monuments in the said survey, tending to establish the lines of the same, as contended for by him. The tenant moved for a new trial, for misdirection of the Judge, at the trial, in matter of law.

The motion for the new trial was argued at this term by
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C. S. Daveis for the tenant, and by *Deblois*, (with whom was *Wm. Pitt Fessenden*), for the demandant.

Deblois, (with whom was *Wm. Pitt Fessenden*), against the new trial, argued, in substance, as follows: There is a *mistake* in the description of the grant from the Commonwealth of Massachusetts to Taunton and Raynham, dated January 1st, 1820, inasmuch as the several trees, marked as boundaries, are not found in the north line of the million acre tract; and, there being such a *mistake*, the *actual location* on the face of the earth is to govern; and in the case at bar, the line marked by these monumental trees is to govern, instead of the north line of the million acre tract. The rule of law is, that where land is conveyed by a deed referring to a plan, between which and the original survey, there is a difference in the location of lines and monuments, the lines and monuments originally marked are to govern, however they may differ from those represented on the plan. *Cherry v. Slade* (3 Murph. R. 82); *Conn v. Penn* (1 Peters, C. C. R. 496); *Mageehan v. Lessee of Adams* (2 Binn. 109); *Ripley v. Berry* (5 Greenl. R. 24); *Brown v. Gay* (3 Greenl. R. 126); *Esmond v. Tarbox* (7 Greenl. R. 61); *Machias v. Whitney* (4 Shepley, R. 342); *Herbert v. Wise* (3 Call, R. 239); *Dewitt v. Lashbrook* (2 Dana, R. 2); *Brown v. Gray* (3 Greenl. R. 126); *Pernam v. Ward* (6 Mass. R. 133); *Magoun v. Lapham* (21 Pick. R. 135). The case of *Frost v. Spaulding* (19 Pick. R. 445) is directly in point; and affirms the principle, by which, we say, the present case is governed. In the present case, however, the facts are stronger to support the principle, than in the case last cited, inasmuch, as in the case at bar, the monuments are set forth in the grant, while, in the case cited, the monuments were not fixed, until after the deed was made. See also *Vose v. Handy*

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(2 Greenl. R. 322) ; *Wing v. Burgess* (1 Shepley, R. 485) ; *Wendell v. The People* (8 Wend. R. 190).

All grants and conveyances are supposed to be made with reference to an actual view of the premises by the parties thereto ; and it is, therefore, a general rule, in the construction of grants, that both course and distance must give way to natural or artificial monuments or objects ; and courses must be varied, and distances lengthened or shortened, so as to conform to the natural, or ascertained objects or bounds called for by the grant. *Wendell v. The People* (8 Wend. R. 190).

Parol evidence is admissible to show, that a course and boundary, in a survey and patent, are incorrectly stated, and that they are otherwise upon the ground. *Mageehan v. Lessee of Adams* (2 Binn. R. 109).

C. S. Davis for the defendant, in support of the motion for a new trial, argued in substance as follows :

The first rule of construction requires, that the intentions of parties should, if possible, be carried into effect.

It is not disputed, and does not admit of question, that the half-township, granted to Taunton and Raynham, should abut upon and adjoin the million acre tract, granted to Bingham.

But it is contended, that this should not prevent the introduction of proof by parol evidence, that such intention was not carried into effect, and that the *yellow birch tree*, referred to in the survey as standing on the line of the million acres, did not, in fact, stand there.

The general rule, that monuments referred to in a deed may be ascertained and established by parol evidence, is not to be questioned. Even this case affords example and occasion for its application.

Parol evidence is to be received to prove the location and previous existence of the million acre grant to Bingham, and the north million acre line. Such testimony does not vary,

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nor contradict, the language in the conveyance. On the contrary, it only applies it.

So, there may be two or more streams, trees, (yellow birch trees), stakes, or other monuments, each conforming to the description in the deed ; and in such case, a latent ambiguity is disclosed, which may be explained by parol evidence.

If, in attempting in this case to designate upon the earth the bounds named in the conveyance, it had been found, that there was no such location as the million acres, and no such north line ; then so much of the description, though apparently plain and clear, would have been found to be false, and that portion must have been rejected.

And parol proof might then have been admitted, to prove the situation of the *yellow birch tree* ; and that proof would not have contradicted any thing, which could be regarded as a part of the deed.

When a conveyance declares a fact, as that the land, conveyed or granted, adjoins a *river*, or a *street*, or a *road*, parol evidence cannot be admitted to prove, that it does not, unless a latent ambiguity be found, or unless the allegation be found to be false, and is, therefore, rejected.

When the monuments referred to in the location of this grant, such as the million acre grant, and the north million acre line, are found to exist, as described, to allow the land granted to be separated from them by parol evidence, would be to give a preference to that, which is uncertain, dependent on memory, and subject to change, to that, which is clearly expressed, and declared in writing, and is of positive and certain designation.

The north *line of the million acres*, already surveyed, was a monument, named in the grant, as where the yellow birch stood ; and it appears to have been adopted for the purpose of defining with certainty its position and situation.

The yellow birch tree is not to be disturbed or separated

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from the million acre north line. The language used in the conveyance would be contradicted, and the conveyance itself so far defeated.

If there should be two monuments, equally certain and permanent, and alleged to be found at the same point, and it should appear in proof, that both existed, but not at the same point, a false description would be disclosed; and it would become necessary to determine, from other parts of the conveyance, which allegation was false, and which was to be rejected. But where two monuments, one of certain, and one of uncertain location, are stated to adjoin each other, the one of certain location must be regarded as named for the purpose of making the position of the other certain.

The grant in this case declaring, that the land granted to Taunton and Raynham does adjoin the million acres, the parol evidence to show, that the yellow birch tree, mentioned as being in that line, was elsewhere, is inadmissible.

The following cases were then cited. To the question of construction, — *Friar v. Johnson* (8 Johns. R. 496); *Preston v. Bowman* (6 Wheat. R. 580); *Blagge v. Miles* (1 Story, R. 426); *Thomas v. Hatch* (3 Sumner, R. 170); *Vose v. Handy* (2 Greenl. R. 322); *Frost v. Spaulding* (19 Pick. R. 445); *Urry v. Burgess* (1 Shepley, R. 111). To the question of boundary, *Newson v. Pryor's Lessee* (7 Wheat. R. 7); *Preston v. Bowman* (6 Wheat. R. 580); *Loring v. Norton* (8 Greenl. R. 69); *McIver's Lessee v. Walker* (9 Cranch, R. 173); *S. C.* (4 Wheat. R. 488).

STORY, J. The charge of the learned Judge of the District Court comes to this; that if the north line of the Bingham purchase was not coincident with the monuments on the land, granted by the Commonwealth of Massachusetts to the towns of Taunton and Raynham, then the monuments were to govern, and not the Bingham line, and consequently, that the

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title of the defendant, under the towns of Taunton and Raynham, did not extend to the Bingham line, and the demandants were entitled to the gore or strip of land between that line and those monuments, under the grant to them by the Commonwealth.

The argument, on behalf of the defendant, is, that the charge of the learned Judge was erroneous, because it was the intention of the government, in the grant to Taunton and Raynham, to make the southern line thereof coincident with the Bingham line; and that it is consequently the duty of the Court to give effect to that intention, although thereby the monuments actually on the land should be disregarded. But this is assuming the very point in controversy. I agree, that, in this case, as in others, arising upon the construction of written instruments, the Court are to carry into effect the intention of the parties, if, by law, it may be so carried into effect. But, then, how are we to ascertain the intention of the parties? Certainly not by parol evidence, varying the language, or by mere conjecture; but by the application of just rules of interpretation to the very language of the instrument itself. Now, it may be assumed, that the intention of the government in its grant was, that the southern line thereof should begin at the Bingham line; but it was equally the intention of the government that the land granted should be bounded by the descriptive monuments stated in the grant. The government, from the survey, presumed, that the monuments were actually on the very boundary line of the Bingham purchase. This turns out to be a mistake, the monuments are at a considerable distance north of that line; and they leave a gore or strip of land between the two tracts. It is the common case of a latent ambiguity; and the real question is, what in a case of mutual mistake in the descriptive words of the instrument is to be done? Now, there can be but one of two courses adopted by a Court of Justice, under such cir-

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circumstances; one of which is, to set aside the instrument, as inoperative, on account of the mistake, which would, in this case, be to defeat the object of both parties; the other is, to ascertain the real intention of the parties from the words of grant taken altogether, *ex visceribus concessionis*; and to give effect to that intention, notwithstanding the misdescription, if I may so say, *cy pres*, rejecting such of the descriptive words as are inconsistent with that intention, or are properly to be deemed subordinate, as accidents, and not as incidents thereto. This latter doctrine is the doctrine adopted by Courts of law, upon the ground of the well known maxim, *Ut res magis valeat, quam pereat*. There is no magic in particular instruments; the doctrine is equally applicable to all instruments, where the intention is sought for, and is to be executed. Thus, in a will, if there be a general intention expressed, and a particular intention repugnant to the former, the rule of interpretation is, that the particular intention is to be rejected, and the general intention is to be carried into effect, as the predominant intention of the testator. So if there be a partial misdescription in a will of the devisee or legatee, or of the thing devised or bequeathed, and yet the party or the thing can, by reasonable interpretation, be ascertained with reference to the extrinsic evidence, creating the doubt, Courts of law, as well as of Equity, will reject such part of the misdescription as is manifestly unessential, and give full effect to the main intention, deducible from the words. Now, precisely the same doctrine is applied to the interpretation of deeds, and other written instruments. If the descriptive words are, with reference to the actual facts, repugnant, or inconsistent with each other, and yet the intention of the parties can be ascertained, the misdescription will not vitiate the instrument; but it will yield to the clearly ascertained intention. And it is only when the language, with reference to the actual facts, involves such fatal errors, and mistakes, as leaves the Court

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without reasonable means of ascertaining the real intention, that the instrument will be treated as a nullity.

It is with a view to ascertain the intention of the parties to deeds and grants, that Courts of law, for the purpose of founding just presumptions of the intention, have adopted certain rules of interpretation, not as artificial rules, built upon mere theory, but as the true results of human experience. When, therefore, they have held it to be a general rule, in the interpretation of the descriptive words of deeds and grants, that courses, and distances, and admeasurements, and ideal lines, should yield to known and fixed monuments, natural or artificial, upon the ground itself, they have but adopted the result of the common sense of mankind, because sources of mistake may more easily arise from the former than from the latter; and it is more likely, that men may commit an error in courses, or distances, or admeasurements, or in references to ideal lines, such as those of surveys, than in monuments, and fixed and stationary objects, visible on the very land; and that in purchases and sales and bounties, the latter, as the best ordinary means of information, as well as of exclusive possession, are uppermost in their minds, and regulate their acts, and intentions. Hence, a known spring, referred to as the corner of a boundary line, has always been deemed a more certain reference, in the understanding of the parties, than the ideal line of a survey of the land of another person, supposed to terminate at the same place. If they differ in point of location, the uniform rule is, that the spring governs as to the corner boundary, and not the survey. For the like reason, the plan of a survey, if it does not coincide with the actual monuments on the land, yields to the latter in point of certainty, and proof of intention. The same ground is equally true as to courses and distances from monument to monument. If they differ, the monuments govern, and not the courses or distances; or, in other words, measurements yield to monuments, because

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they are more open to mistake, and less carefully observed, or significantly marked.

I have dwelt the more upon this point, because the main stress of the argument has been rested upon the supposed intention of the parties ; and it has been pressed upon the Court, that the cases, which have been already decided, do not conclude the present case ; or, indeed, if they otherwise would, that they are not founded upon satisfactory reasoning. In my judgment, all the cases, cited at the bar, turn upon one and the same general principle ; and that is, to give effect to the real intention of the parties, whenever it can be ascertained from the words of the instrument, and the actual state of the facts ; and if there is a misdescription, to apply the common rules of interpretation to resolve the doubt, and to give effect to the predominant intention.

Besides ; We must treat the present case exactly in the same way, as if the grant, instead of being a bounty, had been a sale for a valuable consideration by the government. Suppose, then, that the north line of the Bingham purchase, instead of falling short of the monuments, had actually extended far beyond and within them, so as to have cut off one third of the granted land, owing to the monumental boundaries, what would have been the legal result ? Would the government, if the grant had amongst other covenants contained a covenant of warranty, be entitled to set up the defence, that the Bingham line was the boundary, and not the monuments ; and hence, that there was no breach of the warranty ? Clearly, such an interpretation would be held inadmissible ; and yet it ought to prevail in that case, if it be allowed to prevail in the present case. Indeed, in cases of this sort, the principles of interpretation must be the same, whether the grant be a public grant, or a private grant. The boundaries, in case of a misdescription, must be ascertained precisely by the same rules, and none

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other, since the intention must be the same, whether the grant be public, or private. It is essential to the protection of titles, that the interpretation should depend upon known, fixed, uniform principles, and not upon the conjectures of judges, or the nice balancing of possible intentions, or the supposed leading but undefined motives, in a particular grant.

What ground is there in the present case, any more than in any other, to suppose, that the line of the Bingham purchase was, in the view of the parties, primary in importance, and that the monuments on the ground were to yield to that line, although it might be a mere imaginary line, wholly dependent upon courses, and distances and quantity of acres, not included within any visible boundaries on the land, or otherwise precisely defined? I profess myself unable to perceive any ground for such an interpretation. Suppose the Bingham line, truly run, had receded three miles south of the line, held by possession, would the grant to Taunton and Raynham reach those three miles, and over all the intermediate space, although instead of a half township, it might then include a whole township? Or, under the like circumstances, would the line by possession govern, although it varied equally from the monuments and from the true line? The truth is, that the moment we desert the old rules of interpretation, we are off of soundings, and deliver over the titles to lands to interminable doubts. Here, if ever, the rule should apply, *Via trita, via tuta*. For myself, I must say, that all the authorities, cited on the present occasion, are in my judgment harmonious upon this subject; and they differ only in applying the same general rule to the varying circumstances of each particular case, with a correspondent flexibility of force and adaptation.

The case of *Newsom v. Pryor* (7 Wheat. R. 7), affords a strong illustration of the general doctrine. It was there said, by the Court, that the general rule in all cases of this sort, is, "That the most material and most certain calls shall control

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those, which are less material and less certain. A call for a material object, as a river, a running stream, a spring, or even a marked tree, shall control both course and distance." The same doctrine was fully recognized and acted upon in *McIvers' Lessee v. Walker* (9 Cranch R. 173); in *Preston v. Bowmar* (6 Wheat. R. 380); in *Barclay v. Howell's Lessee* (6 Peters R. 498); in *Boardman v. Reed & Ford's Lessee* (6 Peters R. 328), and, indeed, in all the subsequent cases, which have come before the Supreme Court of the United States. Decisions of a similar nature are to be found in the reports of many of the States in the Union; and with such a uniformity of interpretation of the doctrine, as is rarely to be found in any other class of cases.¹ The authorities, cited at the bar, from the Maine and Massachusetts Reports, fully sustain the same position. The same rule pervades the whole current of the English authorities; and the leading cases will be found referred to, in *Doe dem. Smith v. Galloway* (5 Barn and Adolph. 43). In short, the maxim, *Falsa demonstratio non nocet, cum de corpore constat*, is here applied with good significance and propriety; and the intention, which overrides the mistake in the description, is deduced from other demonstrations less fallible and more certain, both in character and importance. The case of *Frost v. Spaulding* (19 Pick. R. 445), approaches very nearly in its main circumstances to the present case; and if an authority was wanting, it would certainly have a persuasive influence. But I prefer to place the present case upon the general ground already mentioned, as one sustained by solid reasoning, just interpretation, and general convenience.

The motion for a new trial must therefore be over-ruled, and judgment on the verdict be given for the demandant.

Judgment for the plaintiff.

(1) See many cases collected in Metcalf and Perkins's Digest, title Boundaries, vol. I. p. 473 to 476. Greenleaf on Evid. § 301, and the authorities there cited.

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WHERE an under-sheriff attached certain goods without a schedule, and made return thereof as of the value of \$7000, and obtained a receiptor therefor with the consent of the plaintiff's attorney, and afterwards, by leave of the State Court, amended his return by reducing the sum to \$2,900, the actual value of the goods; *It was held*, that it was within the discretion of the Court to allow such an amendment, it being a case of pure mistake; and that the decision by the State Court was not revisable by the Circuit Court.

Held, also, that in cases of special attachment, the plaintiff's attorney has an implied authority to do all acts, which the interests of his clients may require, and that, in the present case, his assent to the appointment of a receiptor was conclusive.

Where an officer, with the creditor's consent, makes a valuation of goods, without taking an inventory, such valuation is to be considered, *prima facie*, as fair and just, and the burthen of proof is on the officer to establish the contrary; but it does not operate as an *estoppel*.

Where an officer is sued for any official misfeasance, the plaintiff can recover only his actual loss, arising therefrom.

The consent of the creditor to the bailment to a receiptor of goods attached only exempts the attaching officer for losses not occasioned by his neglect or misfeasance.

In this case, the original declaration was upon a refusal to deliver up, upon an execution, goods valued at \$7000, and upon leave to amend, granted by the Court, a new count was introduced, claiming them at \$2200; and *It was held*, that although it was within the discretion of the Court to allow the new count, yet, since the line of defence was thereby materially changed, it ought only be granted upon payment of the defendant's costs up to the time, when the offer to file such count was made.

CASE by the plaintiffs against the defendant, a Deputy Sheriff of the County of Penobscot, Maine, for an official neglect and misfeasance in not satisfying an execution in favor of the plaintiffs against one Dwight Allen, out of certain goods, which had been attached upon the *mesne* process in the same suit. The original declaration contained various counts. The first was for not safely keeping the goods. The second for falsely and fraudulently altering the return upon the original

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writ as to the value of the goods. The third was for falsely and fraudulently altering a receipt given for the goods.

The case came before the Court upon the following facts: The plaintiffs, by their attorney, Enoch Brown, instituted a suit against Dwight Allen; the writ was delivered to the defendant, a deputy sheriff, for service, and he made return thereon of an attachment of "sundry goods, wares, and merchandize, as the property of the said Allen, being all the goods in the store, of the value of \$7000." No inventory was taken, but a valued receipt was given, corresponding to the return, which was approved by the plaintiff's attorney. The defendant, while the action was pending, and after he had ceased to be an officer, altered the return and the receipt, by changing the estimated value therein from \$7000 to \$2200, the latter sum being the actual value of the goods. This amendment was made by him under leave to amend, granted to him by the State Court, the plaintiff's attorney consenting to such an alteration, as should reduce the valuation to the actual worth of the goods attached. Judgment was recovered in the suit, and execution issued for \$7000, but the defendant refused to deliver goods of such a value.

Rogers and *Greenleaf* for the plaintiff; *Appleton* (with whom were *Fessenden* and *Deblois*), for the defendants.

The argument for the plaintiffs was, in substance, as follows: 1. The defendant having affixed, in his original return, and in his original receipt, a certain valuation of the personal property attached by him, is concluded thereby. If he would have avoided such a liability, he should have taken an inventory of the goods, and then parol evidence would have been admissible to show their value. But not having done so, there is

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nothing whereby to correct the return; and as no other rule or measure of ascertaining the damages was agreed upon, than the return, the value stated therein is to be taken as the liquidated amount of damages, which the debtor, the sheriff, the receiptor, and the plaintiff, are estopped from disputing.

Where a sum is named, and the damages are incapable of ascertainment by any satisfactory or known rule, it is considered as liquidated damages, and concludes all parties. *Fletcher v. Dytche* (2 T. R. 32); *Lowe v. Peers* (4 Burr. R. 2225); *Pierce v. Fuller* (8 Mass. R. 223); *Noble v. Bates* (7 Cow. R. 307); *Smith v. Smith* (4 Wend R. 468); *Jones v. Green* (3 Younge and Jerv. R. 298); *Woodward v. Giles* (2 Vern R. 119); *Brooks v. Hubbard* (3 Conn. 58). The reason, why an estimated value is thus conclusively taken, is stated in Story on Bailments, 254.

That the receiptor is conclusively bound by the value expressed in the receipt, if no inventory is taken, was settled in *Jewett v. Torrey* (11 Mass. R. 219); see also *Drown v. Smith* (3 N. Hamp. R. 299). So, also, where a sheriff returns, that his bailiff had seized goods on a *feri facias*, to the value of £160, which were rescued; it was held, on *scire facias*, against him, that he was liable for the amount returned. *Mildmay v. Smith* (2 Saund. R. 343); *Clarke v. Withers* (2 Ld. Raymond R. 1072); *S. C.* (1 Salk. R. 322; 6 Mod. R. 290; Holt 303, 646). See, also, as to the conclusiveness of the return, *Drown v. Smith* (3 N. Hamp. R. 299); *Bridge v. Wyman* (14 Mass. R. 195); *Wakefield v. Stedman* (12 Pick. R. 562).

The receipt is conclusive evidence of the attachment, and of property in the debtor; *Lyman v. Lyman* (11 Mass. R. 17); *Spencer v. Williams* (2 Verm. R. 212); *Burley v. Hamilton* (15 Pick. R. 40). And the creditor has also an interest therein. See *Clark v. Clough* (3 Greenl. R. 357); *Cooper v. Mowry* (16 Mass. R. 8).

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Here, the plaintiffs waived their right to have an inventory taken in consideration of the receipt, as originally shown to their attorney, and of the officer's return of the gross amount. They reposed upon this security, and had no means, subsequently, of ascertaining the nature or value of the goods; and, therefore, the sheriff cannot deny, that he attached goods to the value of \$7000, and the plaintiffs have a vested right against him for that amount, and also in the receipt, as collateral security therefor: —

2d. Have these rights ever been destroyed? The sheriff has, by leave granted by order of Court, amended his return by substituting 2000 for 7000; but what is the effect of such an amendment upon the right of parties?

The discretionary power of the Court to allow amendments, is limited in its operation to *remedies* and *forms* of proceeding. The leave to amend an officer's return is never granted, unless there is something to amend by; *Haven v. Snow* (14 Pick. R. 28). When leave is given to amend, its effect is only to protect the officer from punishment criminally, for misdemeanor or for forgery, to which he would be liable, if an alteration were made without authority. But the effect of the amendment, when made, is an open question; *Emerson v. Upton* (9 Pick. R. 167, 170). And it cannot be permitted to disturb or divest rights already vested; since this would be to give greater effect to the order of a judge at *nisi prius*, without a hearing, than to a solemn judgment in bank; inasmuch as an order of leave to amend is not open to revision, nor revisable on error. However the amendment be made, it is made at the peril of the officer; *Thatcher v. Miller* (11 Mass. R. 413); *Wells v. Battelle* (11 Mass. R. 481).

The general course of the Courts is, first, to ascertain the nature of a proposed amendment, and if it will disturb vested rights to refuse permission to amend; *Williams v. Brackett*

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(8 Mass. R. 240); *Freeman v. Paul* (3 Greenl. R. 260); *Mears v. Osgood* (7 Greenl. R. 146). But whether this prudent forecast be exercised or not, the principle is the same. Vested rights cannot be taken away nor impaired.

3d. The plaintiffs have done nothing to impair the rights vested in them. Neither the sheriff, nor the Court, as we have seen, could impair or modify such rights; nor had the attorney, Mr. Brown, any right to consent to any modification thereof. An attorney, it is true, has power to control the proceedings, and to do all acts necessary and conducive to the collection of the debt. But he cannot defeat it; nor compound it; *Lewis v. Gamage* (1 Pick. R. 347); nor assume it, if the judgment debtor is his own creditor to the same, or a greater amount; nor can he receive pay by securities against other persons to be collected and accounted for; *Langdon v. Potter* (13 Mass. R. 319). If, therefore, the return had been altered with Mr. Brown's consent, the alteration would have had no legal effect. But he did not give such consent. His approval of the sheriff's doings goes only to indemnify the sheriff against any action for making the attachment. The paper cannot have the effect of releasing the officer from all liability with regard to the care of the goods, and the solvency of the receiptors, for this would be to make the plaintiffs themselves responsible as bailees, which he could not do; *Langdon v. Potter* (13 Mass. R. 319). Nor is there any usage, anterior to this receipt, which would give validity to the acts of the plaintiff's attorney in the approval of the receipt; and if there were, its being in contravention of law, it could not legalize the act. So, also, the plaintiffs have not approved of the alteration, nor in any wise confirmed it.

4th. If the officer, by virtue of his original return, rendered himself liable to the plaintiffs for the amount of the debt, and if the plaintiff be presumed to know the law, as we say he must be, then the alteration is a fraud upon the plaintiffs, within

the allegations of the second count, because it diminishes his liability.

At all events, the defendant is liable on the last count. This count does not introduce a new cause of action, because the preceding counts show the nature of the claim, and the latter simply confirms the declaration and the disclosures in the other counts, and could not operate as a surprise upon the defendants. It is only the same cause of action, differently set forth.

The argument for the defendants was as follows :

1. The first count is for not safely keeping certain goods, wares, and merchandize, attached in the writ, *Pierce & al. v. Allen*. The defence is, that the attachment was made by direction of the plaintiff's attorney, and that, by the same authority, a receipt was taken, and the officer thereby released from his responsibility for the safe keeping of the goods attached.

It is well established, that the officer is discharged when he acts by the authority of the plaintiff; *Dunham v. Wild* (19 Pick. 520). He is equally so, when he acts in pursuance of directions given by the attorney to the plaintiff. The sheriff is not bound to make a special service by attachment, without directions to that effect; *Betts v. Norris* (3 Shep. 469). If the attorney may direct an attachment, and if the sheriff be not bound to make one without such directions, it would seem to follow, that if he direct one to be made, he might likewise direct as to the mode and manner of such attachment, and as to the custody of the goods so attached.

The powers of an attorney are much more extensive in this country than in England. He may refer an action; *Buckland v. Conway* (16 Mass. 396). He may bind his client by entering into a recognizance; 1 Pick. 462. He may admit facts or confess judgment; 5 N. Hamp. R. 393; 2 N. Hamp. R. 520.

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He may release the right of review; 5 N. Hamp. R. 393. His agreement, that the plaintiff shall release bail, operates as a discharge; 1 Murphy 146. He may be a party to an assignment; *Gordon v. Coolidge* (1 Sumn. 537). He may consent to be defaulted or may discontinue an action; 2 Ld. Raymond 1142. The Court will enforce his agreements against his principal; *Union Bank v. Geary* (5 Pet. 99). Even his compromises will be enforced, though strictly he may have no authority to make any; *Holker v. Parker* (7 Cranch 436). His directions as to the mode of enforcing an execution will be binding on the sheriff; 7 Cow. 739. His instructions as to time and method of selling on an execution are a sufficient justification to the sheriff; *Lynch v. Commonwealth* (16 Serg. and Rawle 368); *Scott v. Silver* (5 Watts 325). If then by a discontinuance or by a reference of all demands he may entirely vacate the attachment, why may he not modify it? The greater includes the less. If the attorney may not give directions as to the mode in which property attached may be kept, it would seem, that he could not direct the surrender of property attached, even though satisfied, that it did not belong to the judgment debtor. Indeed, it is equally the interest of all parties, that the attorney should have this authority.

2. In the second count, the plaintiff claims on the ground of a false and fraudulent alteration of the return, in relation to the *value* of the property attached. Claiming the amendment (or alteration) of the return to have been made falsely and fraudulently, the plaintiff would seem to concede the right to amend.

The plaintiffs by the record of the proceedings in the suit, *Pierce & al. v. Allen*, to which they were parties, show, that whatever was done was done by *leave* of Court. They are estopped to contest whatever is therein alleged to have been done under the sanction of the Court, whose records they produce. But the Court had full authority to authorize the

amendment, it being to correct a mistake. The Court even after the lapse of twenty years, will allow an officer to amend his return for the purpose of correcting an error. *Gilman v. Stetson* (4 Shep. 125); *Eveleth v. Little* (4 Shep. 374); *Thatcher v. Miller* (11 Mass. 413); *Buck v. Hardy* (6 Greenl. 162). The town clerk may amend a record, though others may have contracted upon the faith of it; *Chamberlain v. Dover* (1 Shep. 466).

The granting or refusing leave to amend was purely a matter of discretion in the Court, and their determination is conclusive on all parties. *Foster v. Haines* (1 Shep. 307); *Sheehy v. Mandeville* (6 Cranch 253); *Wyman v. Dorr* (3 Greenl. 183); *Clap v. Balch* (3 Greenl. 216). Leave to amend was granted by a Court having competent jurisdiction. So long as a judgment remains in full force, it is in itself evidence of the right of a party to the thing adjudged; *Voorhees v. Bank of United States* (10 Pet. 449). Until reversed, the judgments of a Court, whether correct or not, are binding on every other Court. *Elliot v. Piersol* (1 Pet. 340); *Haskell v. Sumner* (1 Pick. 460).

The plaintiffs claim for a false and fraudulent alteration of a return made by the officer. It was done in pursuance of leave granted by the Court. The allegation is, that the officer altered the *estimated* value of the property attached from the true to a diminished and *false* value. The alteration does not affect a change in the property attached; that remains identically the same after, as before the amendment. The only alteration is in the estimated value, and for the purpose of correcting a mistake. This may be considered as substantially an action against the defendant for a false return. The burthen, then, is on the plaintiffs to show, that the return is false. The truth of the return is a legal presumption. *Clarke v. Lyman* (10 Pick. 47); *Boynton v. Willard* (10 Pick. 169); *Bruce v. Holden* (21 Pick. 189). The amended return, as it

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stands on the place of the original return, is equally to be presumed true; *Chamberlain v. Dover* (1 Shep. 472). The evidence offered does not control this presumption of law. The plaintiff has, therefore, made out no claim for damage.

Besides, the amendment does not vary the liability of the officer. The extent of the sheriff's liability is the damage actually sustained. Had the officer made no attachment, or falsely returned, that he could find no goods, the actual loss arising from such false return would be the measure of damage. *Weld v. Bartlett* (10 Mass. 475); *Eaton v. Ogier* (2 Greenl. 49); *Brooks v. Hoyt* (6 Pick. 469); *Woods v. Varnum* (21 Pick. 169); *Norton v. Valentine* (3 Shep. 37); *Clark v. Smith* (10 Conn. 1); *Wild v. Green* (1 Fairf. 20).

Had there been no amendment, the officer might have shown that the property attached was not the judgment debtor's. *Bursley v. Hamilton* (15 Pick. 40); *Townsend v. Newell* (14 Pick. 332); 12 Pick. 557. The estimate of value can no more operate as an estoppel than the assertion of ownership in the receipt. The plaintiff then has sustained no damage by the alteration, as the same facts might have been shown in reduction of damage.

3. The third count alleges, that the plaintiff has sustained damage from the alteration of the receipt taken by the officer. But this affords no legal ground of complaint. The receiptor's liability is coëxtensive with that of the officer. The amendment of the return having been legally made, the alteration of the receipt follows as a necessary consequence; *Norris v. Brigham* (2 Shep. 431).

4. The amendment, by which the plaintiffs claim to recover for the goods attached according to the amended return should not be allowed. The original writ was for a different cause of action; as different as a claim for seven thousand dollars is different from one for twenty-two hundred dollars. This is substituting a new cause of action, which, under the circum-

stances of the case, the Court will not allow. *Eaton v. Ogier* (2 Greenl. 46); *Tryon v. Miller* (1 Wheat. 11).

STORY, J. — In the present case, the property in controversy was attached upon the original writ, and consisted of all the goods in the store of the judgment debtor, Dwight Allen; and at the time when the attachment was made they were estimated in the gross to be of the value of \$7000, and were receipted for to the officer, with the approval of the plaintiff's attorney, by Messrs Appleton and Hill accordingly; and the officer made due return thereof, as of the value of \$7000 upon the writ. Afterwards, upon a discovery, that the value of the goods had been greatly mistaken, and that they did not, in fact, exceed in value the sum of \$2200, the officer made an application to the State Court, where the suit was brought, to amend his return, which was granted by the Court; and the officer accordingly amended his return, so as to state the value at \$2200, which it is not now denied was the fair value. When the amendment of the return was made, the officer had ceased to be in office; but he was in office when the liberty to amend the return was granted.

It is under these circumstances, that the present suit was brought. All the counts in the original declaration proceed upon the ground, that the officer was bound by his return to have the goods forthcoming to the value of the \$7000, stated in the original return. A new count has since been offered to be introduced, under the leave granted by this Court to amend the declaration, in which count the value of the goods is stated to be \$2200, and the *gravamen* is the refusal of the officer to deliver up the same to the new officer, to whom was entrusted the execution, in order to satisfy the same. And one point is, whether this count does not contain substantially a new cause of action; and, if so, then that it is not admissible under the leave to amend. I think, that the amendment is

within the range of that class of cases in which this Court has been accustomed to exercise in its discretion the power to amend ; for it amounts in legal effect merely to cutting down the claim of the plaintiffs, from \$7000 to \$2200. Still, however, it does so materially vary the line of defence, that it must operate as a surprise upon the defendant. I am satisfied, that it ought not to be granted, except upon the payment of the costs of the defendant up to the time when the amended count was offered to be filed. So that, if the verdict and judgment of the Court shall solely turn upon the new count, it seems to me clear, that the defendant ought to be placed in the same situation, as if he had been apprized of the restricted claim at the commencement of the suit, and had been at liberty, upon paying the \$2200, to escape from all subsequent costs. This is a matter, however, of discretion in the Court as to the terms of granting the amendment.

The real questions, however, upon the merits of the case, are : (1). Whether the original return of the officer was absolutely conclusive and binding upon him and upon the receiptors as to the value of the goods attached, notwithstanding that valuation was founded on a gross mistake of all the parties, innocently made and without fraud. (2). If it would, *per se*, have been so conclusive and binding upon him, whether the case is helped by the amendment made in conformity with the real facts by the authority and leave of the State Court. (3). Whether the plaintiff's attorney, either in virtue of his general authority, as attorney in the suit, or under the special circumstances of this case, had a right to bind his clients by the approval of the receipt.

The last point is mainly dependent upon local habits, usages and practice in the State, rather than upon any well-defined principles of law, applicable to the general rights, duties and powers of an attorney ; for these necessarily vary in different States, and are governed by such local habits, usages and

practice. By the general principles of law (independent of any statute regulation), the sheriff, or other officer, making an attachment of goods, is bound, as nearly as it reasonably can be done, to give in his return, or in a schedule or inventory annexed thereto, a specific description of the goods attached, their quantity, size and number, and any other circumstances proper to ascertain their identity. But I do not know, that he is absolutely bound to affix any valuation thereto; or that, if he should, that valuation would be conclusive or binding upon the attaching creditor, or upon the debtor, or even upon himself, in all cases; for he is to have the identical goods forthcoming to meet the exigencies of the execution, and the value of the goods is, or may be, then ascertained by the sale thereof on the execution. In no just sense is the sheriff or other officer at liberty to substitute his own valuation of the goods in lieu of the production of the goods themselves. When, therefore, he chooses to deliver over the goods to any person, who shall agree to hold the same, and to have them forthcoming to meet the exigency of the execution, the party so receipting is but his own bailee, and not the bailee of the attaching creditor. As between himself and his bailee, the sheriff, or other officer may, for his own indemnity, in case the goods are lost, or never returned by the bailee, affix a value to the goods; which value will be conclusive between them, unless there has been some gross mistake or error in the valuation. But if such mistake or error be shown, the sheriff or other officer would not be entitled to recover more from his bailee than he was liable for to the attaching creditor and to the debtor; for he would then have received a full indemnity. In no case, whatsoever, has the attaching creditor any thing to do with the property, after it is attached by the sheriff or other officer; and of course the bailment is *res inter alios acta*. But it may readily be conceived, that, in many cases, the sheriff, or other officer, might not choose to place the goods attached in the

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hands of a bailee, or friend of the debtor, for safe custody, without the assent of the creditor ; for if he did, and the goods were lost, or wasted, or the bailee should become insolvent, he would be responsible therefor to the creditor. Hence, I presume, the practice has grown up, and it is not an unnatural one for the sheriff or other officer, in cases where the goods are delivered to a bailee on his receipt, to require the consent of the attaching creditor thereto, the effect of which consent must be, that the creditor thereby waives any claim against the sheriff, or other officer, in case the goods should not be forthcoming beyond the amount, which the sheriff or other officer himself is able by the exercise of due diligence to obtain from the bailee or receiptor. The case of *Dunham v. Wild* (19 Pick. 520), fully recognizes this doctrine ; and proceeds upon principles, which are entirely satisfactory. But that case by no means establishes the proposition, which has been pressed at the present argument, that the creditor thereby waives all remedy against the sheriff or other officer by assenting to the bailment. In that case, the bailee made a direct contract, not only with the officer, but with the creditor, to deliver back the goods ; and the Court held, that the officer was not responsible for the sufficiency or the fidelity of the bailee. But it there appeared, that the goods were lost, and that the bailee was insolvent ; so that any suit by the officer would have been utterly nugatory. But if the bailee wrongfully withhold the goods, and is not insolvent, I apprehend, that it is the duty of the sheriff, or other officer, to pursue the remedy which, under the bailment, he has against him ; and if he neglect that duty, the creditor has his remedy over against the sheriff, or other officer. All that the creditor, by his consent to the bailment, is supposed to agree to, is to exonerate the sheriff, or other officer, from all liability for losses occasioned by the insolvency or want of fidelity of the bailee ; but not for losses occasioned by the neglect of the sheriff to

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enforce his own rights and remedies against his bailee. If the cases of *De Moranda v. Dunkin* (4 Term R. 119); and *Hamilton v. Dalziell* (2 W. Black. 952), furnish, as they may fairly be deemed to do, an analogy to support the exemption of the officer from responsibility for the solvency or fidelity of the bailee, appointed by the consent of the creditor, the case of *Taylor v. Richardson* (8 Term R. 505), qualifies the doctrine, and establishes, that it does not exempt the officer from any other consequences resulting from his own default.

But passing from this to the other consideration of the right and authority of the attorney in the suit to give such consent, on behalf of the creditor, to the delivery of the goods attached to a bailee, or receiptor, I have already suggested, that it must mainly depend upon the local habits, usages and practice in the particular case. If it be, as I take it to be, a very common practice in States, where attachments of property are authorized upon *mesne* process, to deliver the property to some suitable bailee or receiptor, it is doubtless for the interest, both of the sheriff, or other officer, making the attachment, and of the creditor, that such person should be above exception as to property and solvency. The powers and authorities of attorneys in suits in Massachusetts, and Maine, and probably in many other States, are far more extensive, than they are deemed to be in England. The cases cited at the bar in behalf of the defendant, clearly establish this point. By the law of Maine the officer is not bound to make a special attachment of property, unless directed to do so by the plaintiff or his attorney.¹ And the attorney, to whom is intrusted the authority to commence and conduct a suit, is generally understood, in the absence of all special instruction from his client, to possess the authority to make such attachments or not, in his discretion. If he be instructed to make an attachment, it

¹ *Betts v. Norris* (3 Shepley, R. 469).

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would seem to be a natural incident thereto, that he should act in reference to it throughout in the manner, which he should deem most beneficial to his client ; for cases may arise, in which the nature of the property, or its situation (as being perishable, or otherwise subjected to loss or injury), may require, that the attorney should possess authority to give directions, and to make arrangements accordingly with the officer, for the purpose of protecting and preserving the interests of his client. My own opinion strongly is, that the attorney with us is by implication clothed with authority, in all cases of this sort, to do all the acts, which are usual and proper to protect the interests of his client in any attachment, as a part of his ordinary duty. It is for the interest of all clients, that this authority should exist ; for it would otherwise be impracticable in many cases, without great expenses and delays, to do many acts, which might be indispensable to the security of the clients ; and for any abuse or misuse of his authority, the attorney would doubtless be liable to his client. In short, upon this point, I would apply and follow the doctrine laid down by Lord Kenyon in *De Moranda v. Dunkin* (4 Term R. 120) ; and say, "The agent was empowered to put the writ in force, which certainly includes the form and mode of executing it ;" and I would add, of making it most effectual and secure for his principal, for all purposes of the suit.

If, therefore, the question were entirely new, I should not hesitate to say, that, upon the general analogies in our State jurisprudence, the attorney had an implied authority in cases of special attachment to approve and give his consent to the appointment of a bailee or receptor, if he should deem it most for the interest of his client. But, *a fortiori*, the doctrine ought to apply, where the practice has become common for the officer to make such bailments, and to take such receipts, with the approval of the attorney ; for under such circumstances, if not specially objected to, it may be presumed

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to be left to the discretion of the attorney by his client. I understand, moreover, that in point of fact, this very question has come several times under the cognizance of the State Courts, by whose adjudications upon it I should certainly feel myself bound ; and that it has received the very interpretation, which I have maintained.

Then, as to the amendment allowed to be made on the officer's return by the State Court: it appears to me, that this Court has no authority to revise the decision of the State Court upon such a subject. It was incident to the exercise of the general jurisdiction of that Court, of the nature and extent and propriety of which, the State Court was the exclusive judge. But if it were otherwise, I am far from thinking upon general principles, applicable to amendments, as authorized and allowed in most, if not all the New England States, that it was an undue and unjustifiable exercise of the authority of the power to allow amendments. What was its object? Not to state facts, which were untrue and unfounded in the case; but to make the return conform exactly to the real facts, where, by mistake, an egregious error had occurred, injurious to the rights of the officer, and to the benefit of which error the plaintiffs were in no just sense entitled. It is said, that Courts of law have no just authority to allow amendments to be made, which are or may be injurious to the rights or interests of third persons. If by this position be meant their real rights and true interests, positively and absolutely vested in them by law, I agree to that proposition. But if it be meant, that the power of amendment cannot and ought not to be exercised by the Court to correct a positive mistake, and to conform the return to the true state of the facts, I am by no means prepared to admit either the correctness, or the validity, of the proposition, in point of law. On the contrary, as I understand it, it is the duty of the Court, in fit cases, as an exercise of sound discretion, to allow such

amendments, where they are in furtherance of public justice, and to remedy mischiefs, resulting from accident or mistake. In the present case, the attachment was made of a shop of goods, in general terms, valued, in gross, at \$7000. Suppose its real value were only \$2200, and the creditor's debt should be \$2200 only, as finally fixed by the judgment. Could a second creditor attaching the same property be entitled to hold, under the second attachment, the supposed surplus beyond the first judgment, when, in fact, there was none? And might not the Court allow an amendment to be made in the first return, so as to conform to the admitted facts? But the present case is not that of a third person; but of the plaintiff in the suit. As to him, the Court has, in my judgment, a perfect authority to allow such amendments to be made in the return, as shall conform to the truth and justice of the case, and correct an innocent mistake and mischievous error. The Court are not bound to allow the amendment as of course; but it is an exercise of sound discretion under all the circumstances of the case. If there be fraud, or gross laches, or reasonable ground to suspect, that the creditor may be unjustly damaged in his rights thereby, the Court ought certainly to refuse the amendment. And if the officer acts fraudulently in procuring the amendment, the creditor will certainly be entitled to his full remedy for the fraud, notwithstanding the amendment.

The argument upon the other point is, that the return is an estoppel both to the officer and to the receiptor as to the value of the goods attached; and that it is conclusive upon all the parties. It was certainly a very loose and incorrect mode of making this attachment, to make a return of a shop of goods, without any schedule or inventory of the quantity, quality, or nature of the goods; and the officer (as has been already suggested) had, strictly speaking, no right to affix any value thereto. It was no part of his duty. That duty was to re-

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turn a schedule or inventory of the goods, with an appropriate description, so as to have them forthcoming, and identified, to satisfy the execution. The very nature of such a valuation, so set upon a store of goods, must necessarily be deemed to be merely conjectural, and liable to mistake and error. The creditor is not obliged to agree to any such valuation, but may insist on a schedule or inventory of the goods. If he does consent to the valuation, he takes it subject to all the natural consequences. *Primâ facie*, it will be taken to be a fair and just valuation; and the *onus probandi* is on the officer to establish the contrary. But in no just sense can it be deemed an estoppel, without producing manifest and irretrievable injustice. The plaintiff can never be injured, if he has returned, to satisfy the execution, all the goods, or their entire value. Suppose the shop of goods had been forthcoming, and delivered up in satisfaction of the execution; what ground can there be to say, that the creditor is entitled to more than the goods? Surely he could have no legal right to say, that he would reject the goods, and insist upon the \$7000. It may be said, that if the return can thus be amended, or the return of the value be controverted, that it may lead to frauds. It may be so; but cases of fraud will take care of themselves; and Courts of Justice are not to create estoppels, always odious in the law, upon the ground of the possibility of fraud. If it be said, that the creditor may be by the valuation lulled into security, and prevented from attaching other property, that suggestion admits of a ready answer. If the creditor is thus misled by the fraud or imprudence of the officer, and other property might have been attached to cover the deficiency, if the true value of the goods attached had been known, upon proof of such facts, the creditor would be entitled to an adequate remedy against the officer. But if it was a mutual and innocent mistake on both sides, what ground is there to say, that the creditor should profit by it, since it has been an

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involuntary error. It is as much the *laches* of the creditor as of the officer not to have exercised more vigilance. The case of *Wakefield v. Stedman* (12 Pick. R. 562), considered with reference to the facts (it was the case of a horse, valued in the receipt of the receptor at fifty dollars), does not appear to me necessarily to inculcate any different doctrine. The Court there admit, that the value would not be conclusive in case of fraud; and I think it would not be in cases of gross mistake. But where the value is conjectural, and is presumed to be fairly stated, it ought to prevail, unless there be a gross over valuation. The case of *Mildmay v. Smith* (2 Saund. R. 343), is distinguishable. The question there arose upon a writ of error, where the sheriff had returned, that he had seized goods in execution to the amount of £160, which had been rescued from him. There was nothing on the record to show, that this was not the true value; and the Court held the sheriff concluded by it. But in the same case, the Court held, that it would have been different, if the sheriff had returned the goods with their value, and that they remained in his hands for want of buyers; for the sheriff would then have done his duty, and there would be no default in him; and he is not liable for the value returned. To the same effect is the doctrine stated by Lord Holt in *Clerk v. Withers* (2 Ld. Raym. 1072, 1075), where he recognizes the authority of *Mildmay v. Smith*. Now, the very distinction taken in the latter is precisely that on which I rely. In an action on the case the officer is not liable for the value returned, unless he has been guilty of some default or negligence.

There is no doubt, that, notwithstanding the officer's return, that the property attached is the debtor's, he and the receptor may each show, that, in point of fact, it belonged to a third person; and yet this may be said to contradict his return. Indeed, in all cases, where an officer is sued for a false return, or for not having goods attached forthcoming to satisfy the

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execution, or for any other official misfeasance or negligence, the rule is clear, that the plaintiff is entitled to recover no more than what he has actually lost by such misfeasance or negligence. The case of *Weld v. Green* (1 Fairf. R. 20), fully recognized this doctrine. So that, after all, in my judgment, the present case comes to this, what damage has the creditor actually sustained by the amendment of the return? To that he is entitled; and that is the true value of the goods attached, and nothing more. It is admitted, indeed, in the present case, that the true value is \$2200 only, and not \$7000.

In the view, therefore, which I take of the case, the merits of the controversy, upon the points already suggested, are with the defendant. He is liable to the plaintiffs for the true value of the goods, \$2200, and no more.

I have not adverted to other points or facts relied upon by the defendant as in the cause, because upon those already stated, the whole merits are, in my judgment, exhausted; unless, indeed, so far as the point is concerned, that no demand was made upon the officer within thirty days after the execution issued for the goods by the new officer, to whom the execution was committed. Whether this be so or not, I do not know; nor is it agreed by the parties. It is a matter of fact, which must be ascertained, if controverted by the jury. If no demand was, in fact, made within the thirty days, then the right of the plaintiffs seems to me entirely gone.¹ I do not think, that it is indispensable, that that fact should appear upon the return of the officer under this execution; or if necessary, I know of no reason why the return may not now be amended by leave of the Court, to conform to the facts.

(1) *S. P. Norris v. Bridgham* (2 Shepley, R. 481).

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1842, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. PELEG SPRAGUE, District Judge.

IN THE MATTER OF BENJAMIN B. GRANT.

It seems, that a person who has been declared a bankrupt, under the late Act of Congress, may enter into business and hold property, subject to the contingency of obtaining a discharge.

The Court has no authority to order an allowance to the bankrupt for the support of himself and family; but the assignee may make such allowance, not exceeding the sum of three hundred dollars; and he may also allow the bankrupt any reasonable sum for taking charge of the property.

In general, the husband becomes entitled to the personal property, belonging to the wife, at the time of her marriage, unless his marital right be excluded by some express or implied trust; and his creditors may take it in execution or satisfaction of their debts.

Such a trust may be expressly created, or it may be implied from the nature of the gift, or from other attendant and conclusive circumstances.

Gifts after marriage, by third persons, may be expressly made for the sole and separate use of the wife, and if the husband consents to her receiving them, he and his creditors are bound by the trust.

In equity, gifts of personal ornaments or jewelry, made by a husband to his wife, for her sole and separate use, will be good against his personal representatives, in case of his death; but not against his own power to reclaim them during his life, nor against the right of his creditors to take them in satisfaction of their debts.

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Mourning rings given by third persons to the wife, after her marriage, are purely personal, and cannot be touched either by the husband or by his creditors.

A parent may make gifts to his children, if they be proper and suitable in his circumstances and condition; if they be not so, they enure to the benefit of his creditors; but if the gifts have been purchased in part by third persons, the assignee, under the bankrupt law, can only claim the amount paid by the father.

BENJAMIN B. GRANT, a bankrupt, filed in the District Court his petition, as follows:

“ And now, Benjamin B. Grant respectfully represents to this honorable Court, that on the second day of February last past, and at the time of filing his petition, he was possessed, in his individual capacity, of the sum of twenty-two hundred and fourteen dollars and seventeen cents, in cash, as set forth in his schedule of individual property, annexed to said petition. That he was at that time, and has ever since been entirely out of business, and without the means of daily support. That his family consisted of himself, wife, and two sons of the ages respectively of seventeen and twenty years. That they were, at the time of filing said petition, and have ever since been at board, paying therefor the sum of twenty-one dollars by the week. That from the filing of said petition to the fifteenth day of March following, the day when your petitioner surrendered his property, in compliance with the order of this honorable Court, he was compelled to provide for the necessary support of his family, for the space of six weeks, at the rate aforesaid, and having no other means, he paid therefor from out of said sum of twenty-two hundred and fourteen dollars and seventeen cents the sum of one hundred and twenty-six dollars; and your petitioner further states, that his wife is possessed of a watch of about the value of fifty dollars, presented to her by the petitioner about ten years since. That she has likewise several mourning rings

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and pins, and a few other articles of jewelry, of the value of about twenty-five dollars, some of which were given her by friends, and others by the petitioner some years since; and one a mourning ring of the value of about five dollars, given her by the petitioner nearly two years since. And your petitioner further states, that his sons have each a gold watch of the value of about fifty dollars, which were purchased about two years since, with money given by a friend, and with about twenty-eight dollars given to each by the petitioner, out of his private cash. And your petitioner further states, that the assignee of his estate, appointed by this honorable Court, demands of him the payment of said sum of one hundred and twenty-six dollars, and requires the delivery to him of said watches and jewelry in the possession of the petitioner's wife and children, as aforesaid. Wherefore your petitioner prays this honorable Court to order and direct said assignee to forbear and relinquish said demand of payment of said sum of one hundred and twenty-six dollars, and that said sum may be allowed your petitioner. And further that your petitioner's wife and children may be permitted to retain their said watches and jewelry respectively."

To this petition the assignee filed no answer, submitting himself to the order and decree of the Court in the premises. Upon the hearing, the District Judge ordered that the following questions be adjourned into the Circuit Court, to be there heard and determined, namely: 1. Whether, upon the facts stated in said petition, any, and if any, how much of said sum of one hundred and twenty-six dollars shall be allowed to the petitioner? 2. Whether the jewelry and watch of the petitioner's wife shall be retained by her? 3. Whether the watches of the petitioner's sons shall be retained by them respectively?

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The questions now came on to be argued. *Dehón* (with whom was *C. G. Loring*), in opening the case, said, that the first point in the petition was for allowance for money expended in the necessary support of the petitioner and his family. As soon as the decree of bankruptcy was made by the Court, all the property of the bankrupt was divested from himself, and vested in an assignee, as soon as one was appointed. This related back to the time of the petition, and the effect was, that all the property of the petitioner passed from himself at the moment of filing the petition. Unless, then, some provision was made for him; he would in certain cases be entirely destitute. And there was an opinion sometimes expressed, that the petitioner could not enter into business or hold any property until he receive his discharge, which could never take place until several months after he was declared a bankrupt.

STORY J. — I find nothing of that sort in the law. I know of no reason, why the bankrupt may not enter into business and hold property, subject of course to the contingency of obtaining a discharge; for if the bankrupt fails to obtain a discharge, *all* his property will at last be subject to the claims of all his creditors.

In regard to the first part of the petition, respecting an allowance to the petitioner for the support of himself and his family, the Court has no authority to interfere in the matter. The law is express, that all the property of the bankrupt shall be surrendered, with certain exceptions, which are specifically set forth. By the proviso containing these exceptions, in the third section of the act, the assignee is to designate and set apart "the necessary household and kitchen furniture, and other articles and necessities of such bankrupt, &c., not to exceed in value, in any case, the sum of three hundred dollars." Now, under this provision, it is competent for the assignee to

make the allowance sought for in the present case ; but it can be allowed on no other ground than as a part of the three hundred dollars mentioned in the law.

The counsel for the petitioner here stated, that this claim was made by the petitioner, as compensation for taking care of this property, between the time of filing the petition and the decree of bankruptcy.

STORY J. — That is another and a distinct question. Undoubtedly the assignee may allow the petitioner or any one else a reasonable sum for taking charge of the property.

In regard to the watch and jewelry, the rule in bankruptcy is precisely the same as it is in equity. In the first place, as to the personal property belonging to the wife at the time of her marriage, it may be generally stated, that the husband, under and in virtue of the marriage, becomes entitled to it, unless his marital right is excluded by some express or implied trust. No matter, how the property has come to the woman before the marriage, whether by gift or by purchase, by gift of her friends, or by purchase from her own funds, unless at the time of the marriage it stands affected by some trust for her sole and separate and exclusive benefit, it will belong to the husband. It may be affected by an express trust, as by the provisions of a settlement, or by a trust deed, or by the will of a third person ; or the trust may be implied from the very nature and character of the gift itself. If there be no such trust, then the husband, immediately after the marriage, may appropriate the property to his own use ; and his creditors may take it in execution or satisfaction of their debts.

When and under what circumstances a trust, created either expressly, or by implication, before marriage, may be said to remain unextinguished by and after the marriage, is a matter in some cases of considerable nicety. But in all the cases,

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however varied, the same general principle prevails, which is, to ascertain, whether the nature of the trust, which was originally created, in whatever manner it was so created, is by intendment of law a subsisting trust to continue upon and after the marriage, or not. And it by no means necessarily follows, because the gift before marriage was for the sole and separate use of the woman, that the trust will continue after the marriage, and remain unextinguished. Every thing must here depend upon the character and extent of the trust, according to a just interpretation of its terms, if created by express written documents; or if implied, upon the nature and necessary objects of the gift or bounty, whether they are purely and peculiarly personal to the lady, or not.

Personal property, although given to a woman for her sole and separate use before marriage, necessarily belongs to her in absolute propriety and title, and she has the absolute power to dispose of it, as she pleases, while she remains unmarried. That power ceases upon her marriage; and the same absolute right of property and ownership therein then becomes vested in her husband, unless, indeed, it was originally given in trust for her sole and separate personal use after the marriage, and without any right of interference of her then intended husband, or of any future husband. Such a trust may be expressly created, or it may be implied from the nature of the gift, or from other attendant and conclusive circumstances. But it cannot be implied from doubtful circumstances, or from facts, which are equally reconcilable with the supposition, that she might have, and should have a right, to part with the same in favor of her husband upon the marriage.

Gifts made after marriage by third persons may also be expressly given for the sole and separate use of the wife, independent of her husband; and when so given, if the husband consents to her receiving the gifts, he and his creditors are bound by the trust. But the nature of the gift by a third

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person may equally as clearly establish the intent, that it is to be in trust for the sole and separate use of the wife during the marriage, as if it were positively so expressed ; and then the trust will equally attach to and regulate the gift, and bind the husband and his creditors. Neither of them can dispose of any such gift ; but it remains the sole property of the wife under the trust, whether it be express or be implied. Nothing can be more clear, than that property, held in trust by the husband, is not subject to the debts of the husband, or liable to his creditors. The trust adheres to the property throughout for the benefit of the wife, or other person, who is beneficially entitled to it.

But gifts made by the husband to the wife after and during the marriage admit of a different consideration, with the exception of her wearing apparel. They are not strictly at law capable of taking effect ; for the husband and wife are, in contemplation of law, but one person, and are therefore incapable of contracting with or making gifts to each other. In equity, however, it is otherwise ; and the husband may make gifts to his wife of personal ornaments or jewelry for her sole and separate use, which will be good against his representatives in case of his death ; but not good against his own power to reclaim them during his life ; nor good against the rights of his creditors to take them in satisfaction of their debts ; for here the rule is, that the husband must be just, before he is generous. So if the husband dies insolvent, the creditors have a right to take such gifts in satisfaction of their debts. But if his estate is solvent, then, although, in strictness, the creditors may take such gifts in satisfaction of their debts, yet they are not bound to do so ; and if the creditors do take them, then the wife will be entitled to be repaid the full amount out of the other assets of the husband ; for these gifts are good against the representatives of the husband ; and even he himself, since they are of the nature of parapher-

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malia, cannot dispose of them after his death, but only during his lifetime.

To apply these principles to the circumstances of the present case. All the gifts made by the husband to the wife since the marriage, including the watch, and excluding her personal apparel, belong to the creditors, and must be inventoried as a part of his estate divisible among them, if they insist upon their extreme right, as I should hope they will not.

In regard to the mourning rings given by third persons to the wife since her marriage, they are, from their very nature and character, purely personal, and for her sole and separate use, as memorials of the dead, and also of the affection of the living. They are sacred, and cannot be touched either by the husband or by his creditors.

In regard to the watches of the petitioner's sons, if given to them by persons other than their parents, there is no doubt, that they can retain them. If given to them by their father, then the question will depend upon circumstances. If the gift is appropriate and suitable to their condition in life, it will be the property of the sons. If, however, the gift is an unsuitable one, one which the circumstances of the father will not justify, then, in legal contemplation, it is no gift at all; but the transaction will give rise to a suggestion of fraud, and the creditors can take them. I know of no rule of law or of equity, which denies to a parent the right to make gifts to his children, which are proper and suitable in his circumstances and condition; but if they are not so, the father being insolvent, and the gifts being large, then they enure to the benefit of the creditors, even although there was no intention on the part of the father to defraud.

Upon a statement by the counsel for the petitioner, that the

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petitioner was insolvent at the time, when the watches were purchased ;

STORY, J. said, — That makes a difference in the present case. An insolvent person has no right to spend much in articles of mere ornament for his children. But here the assignee can only claim the amount, which was paid by the petitioner towards the purchase of his sons' watches.

The property is in the children, but the amount, which the father has paid for them, must be paid to the assignee. If it be not paid, the assignee can petition the Court, setting forth the facts, and asking for a sale of the watches, unless they are redeemed by a payment of what the father advanced in their purchase.

The following order was thereupon directed to be certified to the District Court :

1. That the petitioner is entitled to an allowance of the said sum of one hundred and twenty-six dollars, or any part thereof, solely in virtue of the third section of the act of Congress of the 16th of August last past, establishing a uniform system of bankruptcy, and as a part and parcel of the allowance thereby required to be designated and set apart by the assignee as necessaries for the said bankrupt, not exceeding in value and amount the sum of three hundred dollars ; and is not otherwise entitled to the same. But the assignee is at liberty to make such reasonable allowance to the bankrupt for the custody and safe keeping of his property, between the time of filing of his petition for the benefit of the act and the assignee's demanding and receiving the same under the proceedings in bankruptcy, as the assignee might reasonably make and allow to any third person for the custody and safe keeping thereof.

2. That the watch of the wife and any jewelry given to

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her by third persons before the marriage, or by her husband either before or since the marriage, pass to the assignee as part of the property of the bankrupt, to which his creditors are entitled. But jewelry given by third persons to the wife since her marriage, as personal ornaments, and mourning rings given to her by third persons since the marriage, as personal memorials, belong to the wife for her sole and separate use in equity, and do not pass to the assignee under the bankruptcy for the benefit of the creditors.

3. That the watches of the sons, under the circumstances stated in the petition, belong to them as their property. But nevertheless, if the petitioner was insolvent, when he applied a part of his own money to purchase the same for his sons, he had no right so to do against the claims of the creditors; and that in equity, therefore, if the petitioner was so insolvent, the sons must account to the assignee for the amount of the money of the petitioner, so paid towards the purchase of the watches. But if the petitioner was not then insolvent, and the donation on his part was made *bonâ fide*, and the donation was suitable to his rank in life, condition, and estate, then it was good, and not within the reach of the creditors, or in fraud of their rights under the bankruptcy.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1842, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. PELEG SPRAGUE, District Judge.

EX PARTE LUCIUS EAMES.

THE bankrupt law of the United States, upon going into operation in February, 1842, *ipso facto* suspended all action upon future cases arising under State insolvent laws, where the insolvent persons were within the purview of the bankrupt law.

Where A. took advantage of the insolvent law of Massachusetts, after the bankrupt law of the United States went into operation, and an assignee was duly appointed in pursuance of the law of Massachusetts, and A. subsequently petitioned to be declared a bankrupt under the law of the United States, *It was held*, that an injunction ought to issue against B. to restrain him from intermeddling with the property of A.

THIS was a case certified from the District Court upon a point arising in bankruptcy. The petition stated, that on the nineteenth of April, 1842, the petitioner filed his petition in the District Court, praying, that he might be declared a bankrupt, pursuant to the statute; that, prior to the filing of the said petition, and on the fourteenth day of February, 1842, Charles Arnold and Henry Adams, merchants, and partners, under the name of Charles Arnold & Company, of Boston, being

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creditors of the petitioner and one Hamlin, his late partner, to the amount of upwards of fourteen hundred dollars, caused certain property, to wit: the stock in trade of the petitioner, of the value of about twenty-seven hundred dollars, to be attached, and taken into the possession of the sheriff of the county of Essex, by virtue of a writ sued out by them against the petitioner on the fourteenth day of February, 1842, and made returnable at the Court of Common Pleas for the county of Suffolk, then next to be holden in Boston in April, which said suit was still pending and undecided; that on the twelfth day of March, 1842, and prior to the filing of said petition, being unable to pay his debts, the petitioner applied to David Roberts, Esq., a master in chancery, of the county of Essex, for the benefit of an act entitled, "an act for the relief of insolvent debtors, and the more equal distribution of their assets," enacted by the authority of the State of Massachusetts, on the twenty-third day of April, 1838; supposing said law to be unrepealed and in full force at the time of his said application for the benefit thereof; that upon his said application, a warrant was issued and publication made and other proceedings had, pursuant to the act last named, and that on the twenty-eighth day of March, 1842, John Ayers, of Boston, was duly appointed the assignee of the goods and estate of the petitioner, and accepted said trust under the act aforesaid; that after the appointment of said assignee, he was informed that doubts were entertained respecting the validity of said proceedings under the said insolvent act, and that he was advised by counsel, that the same had been repealed, from and after the first day of February, 1842, by force of the statute of the United States, establishing a uniform system of bankruptcy, and was recommended, in behalf of his creditors, to file his said petition in this honorable Court, for the purpose of protecting the property aforesaid for the benefit of all his creditors, if the assignment aforesaid should be adjudged

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invalid ; that said Arnold & Company were seeking and intended to secure payment in full of the debt due to them from the petitioner and his partner, out of the property aforesaid, and to levy an execution thereon, by means of the suit and attachment aforesaid, to the great injury and detriment of the other creditors of the petitioner, and contrary to law and equity ; that said Ayers was seeking to obtain possession of said property under his said appointment as assignee as aforesaid, and that if, as the petitioner had reason to apprehend, the proceedings under said act of the State of Massachusetts should prove to be invalid, or if said Arnold & Company should levy any execution upon said property, the assignee of the estate of the petitioner, who might be appointed upon the said petition, would be put to great trouble and expense in recovering said property, or its value, for the benefit of all the creditors of the petitioner under the said statute of the United States. Wherefore he prayed, that an injunction might issue to restrain said Arnold & Company from prosecuting further their said suit, and to restrain them and said Ayers from further intermeddling with said property ; and for general relief.

Upon the hearing in the District Court, the following question was ordered to be adjourned into the Circuit Court : " Whether, by law, an injunction can be issued against said Ayers, as prayed for in the said petition."

The case was now submitted by *Dehon* for the petitioner, no counsel appearing on the other side.

STORY, J. — The question for the decision of this Court is, whether by law an injunction can be issued against Ayers, the assignee of Eames, under the Insolvent Act of Massachusetts, as prayed for in the petition of Eames ; and this involves the simple consideration, whether the Bankrupt Act of the United States of 1841, ch. ix., when it came into operation

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in February last, suspended the operation of the Insolvent Act of Massachusetts, as to persons within the purview of the Bankrupt Act, who might afterward become insolvents. If it did, then the injunction ought to be granted; if it did not, then it should be refused.

My opinion is, that, as soon as the Bankrupt Act went into operation in February last, it, *ipso facto*, suspended all action upon future cases, arising under the State insolvent laws, where the insolvent persons were within the purview of the Bankrupt Act. I say future cases, because very different considerations would, or might apply, where proceedings under any State insolvent laws were commenced, and were in progress before the Bankrupt Act went into operation. It appears to me, that both systems cannot be in operation or apply at the same time to the same persons; and where the State and national legislation upon the same subject, and the same persons, come in conflict, the national laws must prevail, and suspend the operation of the State laws. This, as far as I know, has been the uniform doctrine, maintained in all the Courts of the United States.

Indeed, I consider this whole matter in effect disposed of by the reasoning of the Supreme Court in the case of *Sturgis v. Crowninshield* (5 Wheaton R. 122). Mr. Justice Washington and myself were of opinion in that case, that the power to pass a bankrupt law was exclusively vested in Congress by the constitution of the United States; and that no State could pass a bankrupt law, or an insolvent law, having the effect of a bankrupt law, where it discharged the debtor from the obligation of his prior contracts.¹ Mr. Justice Todd was absent from indisposition, and therefore did not sit in the cause. The other four members of the Court (constituting a

¹ See Mr. Justice Washington's opinion in *Ogden v. Saunders* (12 Wheaton R. 263, 264).

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majority) concurred in the decision, which was pronounced by Mr. Chief Justice Marshall. But all the Court were agreed, that when Congress did pass a Bankrupt Act, it was supreme, and that the State laws must yield to it, and could no longer operate upon persons or cases within the purview of such act. The enactment of such an act suspended the State laws on the same subject, and created a disability in the States to exercise powers of the like nature.¹ The Court went further ; and asserted that the Bankrupt Act of 1800, ch. xix., had that very operation, except so far as the 61st section of the act modified or allowed the exercise of the power by the States.² The case of *Ogden v. Saunders* (12 Wheat. R. 213, 264, 269, 273, 276, 278, 296, 311, 314), fully recognised, and has always been understood to confirm and settle, the same principle. It seems to me, therefore, that nothing remains, upon which an argument can be founded, that the insolvent laws of Massachusetts are not, as to persons and cases, within the provisions of the Bankrupt Act, completely suspended. Each system is to act upon the same subject matter, upon the same property, upon the same rights, and upon the same persons — creditors, as well as debtors. Both cannot go on together, without direct and positive collision ; and the moment, that the Bankrupt Act does or may operate upon the person or the case, that moment it virtually supersedes all State legislation.

I shall, therefore, direct it to be certified to the District Court, that in this case, by law, an injunction can be issued against the said Ayers, as prayed for in the said petition of Eames.

¹ *Sturgis v. Crowninshield* (4 Wheaton R. 196).

² *Id.* p. 201, 202.

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EX PARTE HENRY W. FULLER.

IN a devise of real estate, the title passes to the devisee at the death of the testator, and the probate of the will relates back to that time.

A devise by will vests in the devisee only upon his consent thereto; but when the devise is plainly for his benefit, as if it be of an unconditional fee, without trust or incumbrance, his consent will be presumed, and some solemn act is required to constitute a disclaimer or renunciation thereof.

THE provision in the Revised Statutes of Maine, chapter 92, section 25, in relation to the probate of wills, is merely affirmative of the law, as it antecedently stood.

WHERE a devise has been made to a bankrupt, and accepted by him, it is a fraud upon his creditors for him to disclaim, or renounce it, and the Court will compel him to do all acts necessary to perfect his title to the devised estate.

AN estate was devised unconditionally to A. and his sister. Subsequently to this, but before the will had been admitted to probate, A. filed his petition to be declared a bankrupt. *Held*, that the estate, so devised, became the property of the assignee appointed in bankruptcy, so that he might sell and convey the same, as a part of the estate of A.

THIS case came up in the District Court on a petition by the assignee for leave to sell one undivided half part of certain real estate in Portland, Maine, which was devised to Andrew Ross, a bankrupt, and his sister; and which was referred to in the original petition of the bankrupt, as follows: "David Ross, of Portland, Maine, grand-father of your petitioner, died at Portland, Me., the latter part of December, 1841, and your petitioner has reason to believe he may, by his wife, have bequeathed to him and his sister, a certain piece of property in Portland. The instrument purporting to be his last will and testament has not been presented for probate, and of course has not been proved, approved and allowed." Andrew Ross filed his petition to be declared a bankrupt on February 8th, 1842, and was declared a bankrupt on March 22d, 1842. David Ross, the grand-father of Andrew, died December 29,

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1841, testate. His will was presented and filed for probate at Portland, March 15, 1842, and was proved, approved and allowed, April 19, 1842. Andrew Ross, who was named in the will, as one of the Executors, upon being informed of the fact, declined accepting that office, and David Ross, Jun., the other executor, was appointed and qualified as executor. By the will, the estate in question was devised unconditionally and in fee to Andrew Ross and his sister. The will was not filed for probate until after the filing of Andrew Ross's petition to be declared a bankrupt; and was not proved and allowed, until after he was declared a bankrupt. Andrew Ross, living in Boston, had nothing to do with his grandfather's estate, and did no act accepting or declining the devise.

Upon this statement of facts, the following question was ordered by the District Court to be adjourned into this Court, namely: "Whether, upon the foregoing facts, the said real estate, devised as aforesaid to Andrew Ross, is the property of the said assignee, so that he may sell and convey the same as a part of the estate of the said Ross."

The case was argued by *H. W. Fuller*, as assignee, and by *Rogers* for the bankrupt.

STORY, J. — Two questions arising upon the statement of facts are submitted to this Court for decision. 1. In the first place, when upon the principles of the common law, does a devise of real estate take effect in the State of Maine? 2. Is it from the date of the probate of the will, or from the death of the testator, and as connected with this, whether any assent to the devise is required before the estate vests in the devisee? Now, upon this question, I cannot say, that I feel any doubt. The Probate Courts of Maine, (like the Probate Courts of many other States in the Union), have original and

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exclusive jurisdiction over wills of real estate, as well as of personal estate ; and the decision of the proper Probate Court, original or appellate, as to approval or disapproval of such wills, is final and conclusive as to the validity thereof, and cannot be questioned or reëxamined in any other tribunal. In short, our Probate Courts generally possess the same exclusive jurisdiction over the probate of wills of real estate, that the ecclesiastical Courts of England exercised over wills of personalty. This is admitted on all sides ; and, indeed, is now too firmly established to admit of juridical controversy.

Now, as soon as a will of real estate, or personal estate, is admitted to probate, and approved, I take it to be clear, upon the principles of the common law, that the probate relates back to the death of the testator, and affirms and fixes the title of the devisee thereto, from that period. This would seem a necessary result ; for no title can pass by descent or distribution to the heirs or next of kin of the testator, since the whole is disposed of by his will ; and the title cannot be in abeyance, or *in nubibus*, at least, in contemplation of law. Thus, in every trial at the common law, involving a title by devise, if the devisee assents thereto, the title is in him from the death of the testator, by mere operation of law, if the will is established by the verdict of the jury ; although the trial may not occur, until many years after the death of the testator. The like rule applies to the probate of wills of personalty in the ecclesiastical Courts, where the title of the legatees, and of the executor, takes effect by relation from the death of the testator. It is wholly unnecessary to cite authorities upon such a point. But, if it were necessary, Co. Litt. 111. b. is directly in point, where Lord Coke says, that, "In case of a devise by will of lands, whereof the devisor is seized in fee, the feehold, or interest in law, is in the devisee before he doth enter ; and in that case, nothing, having regard to the

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estate or interest devised, descendeth to the heir." The same doctrine was firmly established in Massachusetts (from which Maine derives its jurisprudence), long before my time ; and it is fully recognised in the case of *Spring v. Parkman* (3 Fairf. Maine R. 127). The case of *Shumway v. Holbrook* (1 Pick. R. 114), proceeds upon the admission of the like doctrine, and shows, that no title can be proved to land by devise, in a Court of common law, until the will has been proved in the proper Court of Probate.

As to the other point, there is no doubt, that the devisee must consent, otherwise the title does not vest in him. But where the estate is devised absolutely, and without any trust or incumbrances, the law will presume it to be accepted by the devisee, because it is for his benefit ; and some solemn, notorious act is required, to establish his renunciation or disclaimer of it. Until that is done, *stabit presumptio pro veritate*. That is sufficiently shown by the case of *Townson v. Tickell* (3 B. & Ald. 31), cited at the bar, and the still later case of *Doe d. Smyth v. Smyth* (6 B. & Cresw. 112). *Brown v. Wood* (17 Mass. R. 68), and *Ward v. Fuller* (15 Pick. R. 185), manifestly proceeded upon the same foundation.

Now, in the present case, there is no pretence to say, that Ross has ever renounced or disclaimed the estate devised to him. The statement of facts is, that he has done no act accepting or declining the devise. If so, then the presumption of law is, that he has, by implication, accepted it, since it gives him an unconditional fee. But I think, that the very formulary, in which he has inserted a reference to it in the schedule of his estate is decisive to show, that he intended to accept whatever estate should be devised to him by his grandfather's will. Until he filed his petition in bankruptcy, the presumption of his acceptance is irresistible ; for it was clearly for his benefit ; and after he had done so, I am of opinion,

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that he had no right to disclaim or renounce it. It would be a fraud upon his creditors ; and a Court of Equity would compel him to do all acts necessary to perfect his title to the devised estate ; and if he did not, no Court of bankruptcy would decree him a certificate of discharge.

The bankrupt act of 1841, ch. 9, § 3, vests "all the property and rights of property, of every name and nature," of the bankrupt, by mere operation of law, in his assignee, upon the decree of bankruptcy. Nothing can be clearer, than that, at the time of his bankruptcy, the devise in the present case was a right of property vested in Ross. The law presumed his acceptance, until the contrary should be shown. His title could be divested only by his renunciation and disclaimer of the devise before that time ; and the subsequent probate of the will, by relation, made the title complete in the assignee. If Ross's consent had been necessary to make it complete, he was bound formally to give it ; and he may even be compelled to give it, by a Court of Equity. The right of property was inchoate, if it was not consummated, in the assignee from the moment of the decree in bankruptcy ; and no subsequent act of the bankrupt could change it.

It has been suggested, that the devise was not beneficial to Ross, and therefore no presumption can arise of his acceptance of it. How that can be well made out, I do not perceive. Before his bankruptcy, it was clearly for his benefit ; and that event has not changed the nature of the interest, but merely the mode of appropriating it. His own voluntary act has enabled his creditors to have the benefit of it. As an honest debtor, he must desire, that his creditors should derive as much benefit from all his "rights of property," as is possible. It would be a fraud on his part to withdraw any fund from their reach by a disclaimer or renunciation ; and it ought to deprive him of a certificate of discharge. It is, therefore, clearly now for his benefit to presume his acceptance of the

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devise ; rather than to presume him willing to aid in the perpetration of a fraud.

If this, then, be the true posture of the case, standing upon the general principles of the common law, the remaining question is, whether the Revised Statutes of Maine, of 1840, ch. 92, § 25, have made any alteration in the operation of the common law, as to the probate of wills. The 25th section declares ; " No will shall be effectual to pass real or personal estate, unless it shall have been duly proved and allowed in the Probate Court ; and the probate of such will shall be conclusive as to the due execution thereof." The argument is, that under this clause, a will is a mere nullity before probate ; that the probate gives it life and effect from that time, and not retroactively. It appears to me, that this section is merely affirmative of the law, as it antecedently stood. The will, before probate, is, in no just juridical sense, a nullity. The very language of the section prohibits such an interpretation. The will must still be the foundation of the whole title, inchoate and imperfect, if you please, until its validity is ascertained by the probate, but still a will, and not a nullity. It would be an anomaly in the use of language, to speak of the probate of a nullity. The probate ascertains nothing, but the original validity of the will as such. The act of the testator gave it life ; his death consummated the title, derivatively from himself ; and the probate only ascertains, that the instrument in fact is, what it purports on its face to be. It might as well be said, that a will of real estate, at the common law, is a nullity, until a jury has ascertained its validity ; whereas the verdict ascertains only the fact that the title under the will is perfect, because it was duly executed by a competent testator, and therefore took effect by relation from the time of his death.

But if the argument itself were well founded, it would not warrant the inference attempted to be drawn from it. By the

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probate, when granted, the will, under the section, takes effect by relation back from the death of the testator. It recognises and vests the title in the devisee from that moment. It would otherwise happen, that if he should die before the probate, having accepted of the devise, no title could vest in him; but the bounty of the testator would be defeated. Such a construction of the section would be productive of the grossest mischiefs; and there is not a word in the section, which authorizes, or even countenances it. The section only provides, that no will shall be effectual to pass real estate, *unless* it shall have been duly proved; not, *until* it shall have been duly proved. When proved, it is to all intents and purposes a will; and it is to operate upon the interests of the testator, when he intended, that is, from the time of his death.

Upon the whole, my opinion is, that the question propounded by the District Court, ought to be answered in the affirmative; and I shall direct a certificate accordingly.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

NEW HAMPSHIRE, MAY TERM, 1842, AT PORTSMOUTH.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. MATTHEW HARVEY, District Judge.

PARKER AND BLANCHARD, PLAINTIFFS IN EQUITY, IN THE
MATTER OF MUGGRIDGE AND OTHERS, BANKRUPTS.

A. and B. of Massachusetts, instituted several suits at law against a factory company in New Hampshire and several citizens of that State, in which property was attached on the writs. Various agreements in writing were made by and between the parties, upon the conditions of which, the actions were continued from term to term, until they were defaulted at the August term of the Court, 1841, and the entry of judgment thereon, pursuant to a written agreement filed in Court at the said term, was made at the August term, 1842. Previously to this, several of the defendants had been decreed bankrupts on their own petition; and an injunction was obtained by their assignee, prohibiting the plaintiffs from levying their executions upon the property of the bankrupts. *It was held*, that the contracts, entered into between the parties, constituted an equitable lien, which remained in force, notwithstanding the decree of bankruptcy.

Held, also, that independently of the plaintiffs' claim as an equitable lien, they were entitled to have the injunction dissolved so far as respected the property owned by the bankrupts, and those of the defendants, who had not petitioned to be declared bankrupts.

The general rule in bankruptcy is, that the property of partnerships is first to be applied to the discharge of the partnership debts, and the surplus only is to be applied to the individual debts of any one partner. But if

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it be necessary, in order to make a final settlement of all claims, the Court may take upon itself the administration, as well of the partnership estate as of the estate of the bankrupt partner.

Where one partner becomes bankrupt, his assignee can take that portion of the partnership assets only, which would belong to the bankrupt, after payment of all the partnership debts, and the solvent partner has a lien upon the partnership assets for all the partnership debts, and, also, for his own share thereof, before the separate creditors of the bankrupt can come in and take any thing.

THE following bill in equity, or summary proceeding, was filed in the district Court of New Hampshire by the plaintiffs.

“To the Honorable Judge of the District Court of the United States for the district of New Hampshire. Humbly complaining, show unto your honor, Isaac Parker and Abraham W. Blanchard, both of Boston, in the county of Suffolk, and State of Massachusetts, merchants, late partners in trade, under the firm of Parker and Blanchard, that on and prior to the seventeenth day of May, A. D. 1837, the said Parker and Blanchard held certain notes, and accounts, and other just claims against the Avery Factory Company, a corporation duly established by law, at Meredith, in the county of Belknap, in said district, Josiah Crosby, physician, Abraham Brigham, Alpha Stevens, John Philbrick, and Salmon Stevens, cotton manufacturers, all of Meredith, in the county of Belknap, in said State of New Hampshire, and citizens of said State, and against Charles Parker, Richard Fisher, and Benning Muggridge, also of Meredith, in said county and State, and citizens of said State; and that the said Parker and Blanchard on that day sued out of the Court of Common Pleas for the county of Strafford, three writs of attachment, one against the said Avery Factory, the said Josiah, Abraham, Richard, Benning, and Charles, one against the said Avery Factory Company, the said Josiah, and Abraham, Alpha, John, and Salmon, and another against the said Avery Factory Company, and upon the said writs attached cer-

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tain real and personal property of said Avery Factory Company, and certain other machinery and personal property owned by said Avery Factory, and certain of their said other debtors, and certain real and personal property owned severally by their said debtors, and certain other property owned jointly by several, but not by all their said debtors; and at a term of the Court of Common Pleas, holden at Gilford in and for the county of Belknap, on the first Tuesday of August, A. D. 1842, your said orators recovered judgment in said first mentioned action for eight thousand five hundred and sixty-eight dollars and fifty-three cents debt, and thirty-five dollars and eighty-eight cents costs of suit, and in said action secondly above mentioned, for ten hundred and sixty-three dollars damages, and twenty-seven dollars and eighty-three cents costs of suit, and in said action against said Avery Factory Company alone, for eight hundred and fifty dollars and thirty-five cents debt, and seventeen dollars and seventy-nine cents costs of suit, and the said Parker and Blanchard, and one Marshal P. Wilder, having other claims justly due them from said Avery Factory Company, Charles Parker, Benning Muggridge, Josiah Crosby, and Abraham Brigham, on the day of May, A. D. 1842, sued out a writ of attachment for the recovery thereof, and thereupon attached real and personal estate of said last named debtors, and certain other real and personal estate owned severally by some of said debtors, and jointly by several of said debtors, and at the term of the said Court last aforesaid, recovered judgment in said action for six thousand one hundred and sixty-two dollars and twenty-seven cents debt, and twelve dollars and forty-nine cents costs of suit.

And your orators further show, that after said attachments in said first mentioned three actions, on the tenth day of June, A. D. 1837, they entered into a written contract with said Avery Factory Company, said Crosby, Brigham, Furber,

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Charles Parker, and Muggridge, and on the fifteenth day of June, A. D. 1838, the said Parker, Blanchard, and Wilder, entered into another written contract with said Avery Factory Company, Crosby, Brigham, Charles Parker, Muggridge, Alpha Stevens, and Philbrick, and on the twenty-sixth day of July, 1839, into another written contract with said Avery Factory Company, Crosby, Brigham, Charles Parker, and Muggridge, and on the twenty-eighth day of June, 1840, into another written contract with the last mentioned parties, and on the twenty-eighth day of July, 1841, into another written contract with the persons last mentioned, with the exception of said Brigham, and that in and by all said contracts, it was provided and agreed, that said Parker and Blanchard should cause to be furnished to the said other parties to said contracts, certain quantities of cotton, to be manufactured into cotton cloth, upon certain terms and conditions in said contracts set forth; that the proceeds of said cloth should be applied in certain proportions, in said contracts specified, to the payment of said Parker and Blanchard for said cotton by them to be furnished, and to the payment of the said claims, on which the three actions first above mentioned were founded. And in and by said contracts executed in 1837, 1838, and 1839, it was agreed, upon the considerations therein stated, that if no mortgagees of the mill of said Avery Factory Company should take possession, the aforesaid three first mentioned actions should be continued without cost, till the expiration of said contracts respectively, and in and by said contract, executed in 1840, it was agreed, that if possession should not be taken by the mortgagees of the mill and other property attached in said suits, and if no other attaching creditors should object thereto, the said suits should be continued without cost until the first of August, A. D. 1841; but if possession should be taken by any mortgagee of said mill or other property attached in said suit, or if any attaching cred-

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itor should object to a continuance of the same, so that the same could not be continued, that judgment should be rendered in the said suits against the said parties of the second part to said contract for nine thousand two hundred and ninety-two dollars and forty-five cents with interest thereon from the first day of July, then next, until the rendition of said judgment; and in and by said contract of July 28th, 1841, it was agreed, that the said three actions should be defaulted at the then next term of the Court of Common Pleas for said county of Belknap, and if possession of said mill or property attached should not be taken by any mortgagee, and if no other attaching creditor should object thereto, the three said suits should be continued without costs until the August term of said Court, 1842. But if possession should be taken as aforesaid, or if any attaching creditor should object to said continuance, so that the same could not be continued, that judgment shall be rendered in the said suits against said Avery Factory Company, and said two suits against said Avery Factory and others, for the amounts, for which judgments were subsequently entered against them at the August term of said Court, A. D. 1842, as herein before set forth, according to agreements by them entered into in Court for that purpose. And that the said parties by their agreements in writing, signed by their respective council in Court, and filed in said Court at said August term, A. D. 1841, agreed, that judgments should be entered in said actions, at such term thereof as said plaintiffs should elect, for the sums aforesaid; and your orators further show, that at said last mentioned term of said Court, they elected to take judgment for the sums aforesaid. And the said Parker and Blanchard further show, that at the time of executing said written contracts, it was further agreed and understood between them and their said debtors, that while the said contracts remained in force, and the said actions

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were continued for judgment as aforesaid, the said actions and attachments should stand and remain (the defendants therein having been defaulted, in pursuance of said contracts, at August term of said Court, A. D. 1841), as security for the plaintiffs' said claims, upon which the said three actions were founded; and by virtue of the said written contracts, and of the said agreement and understanding of said parties, the said Parker and Blanchard had a lien upon the said property for their said claims, which lien is not, as they submit to said Court, destroyed, or at all affected by the act of Congress passed August nineteenth, A. D. 1841, or by any thing done by any of the said parties to said contracts by virtue of said act. That said Josiah Crosby, Abraham Brigham, Benning Muggridge, Salmon Stevens, and Philbrick, were, as your said orators have been informed and believe, on the seventeenth day of August, A. D. 1842, by this honorable Court declared bankrupts, in pursuance of said act of Congress, and that one George L. Sibley, of said Meredith, in said State, and a citizen of said State, who was then appointed assignee of said Crosby, Brigham, and Muggridge, has applied to this honorable Court, and upon certain representations unknown to said orators, has obtained a writ of injunction, prohibiting your said orators from levying the said executions upon the property of said Crosby, Brigham, and Muggridge.

That on the twenty-fifth day of September, A. D. 1840, and on the twenty-eighth day of July, 1841, and on other days, the defendants in all said executions, pledged and delivered to said orators large quantities of machinery, goods, and personal property, which has ever since remained in their possession, and they have long since given notice to the pledgors of their intention to sell the same, if not redeemed, and that the said pledgors have neglected to redeem the same; and that in and by said injunction, said orators are not only restrained from levying their said executions upon said

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property, upon which they have a lien by virtue of said attachments, in connection with said agreements, and upon the property owned by the said Avery Factory, and others, who are, by virtue of said agreements, constituted a copartnership, which copartnership has not been declared bankrupt; but also from levying their executions upon the real estate, attached in said suits, and upon which their lien and claim, by virtue of said attachment, will expire in thirty days from the time of the rendition of said judgment, and from selling said property pledged to them as aforesaid.

Wherefore the said orators pray, that the said defendants in said executions may be required to make full, true, and perfect answers to all the matters herein before charged; that the said injunction may be dissolved, and that the lien of said orators upon the said property attached, may, according to the said agreements, be decreed and established as an equitable lien; and that they may have such other and further relief, as the circumstances of their case may require, and as to your honor may seem meet. And that writs of subpoena may issue from said Court to the said defendants in said executions before named, commanding them upon a certain day, and under a certain penalty therein to be inserted, to appear therein, and do, and receive, what the said Court may order."

When the cause came on to be heard, the following order was passed by the district judge.

"On the hearing of the motion of the plaintiffs in the foregoing bill to dissolve the injunction granted upon the application of George L. Sibley, assignee of said Muggridge and others, the following questions arose, which were adjourned for further hearing and decision into the circuit Court of the United States for said district, viz.

1. Do the contracts, stated in the plaintiffs' bill, in connection with their attachments, as entered into by them with the

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Avery Factory Company, said Muggridge and others, constitute an equitable lien which remains in force, notwithstanding the decrees of bankruptcy against said Muggridge and others?

2. Independently of said plaintiffs' claim of lien, should not the injunction be dissolved, so far as it respects the property owned by said bankrupts, and by their copartners, the Avery Factory Company and Charles Parker, who have not petitioned to be declared bankrupts?

3. It was admitted at the hearing, that the actions of said Parker and Blanchard, in which their judgments were obtained, were disposed of at the session of the Court of Common Pleas, held on the first Tuesday of August, A. D. 1842, on the last day of said term, which was the 19th day of said August, but no special entry of judgment, in any other than the usual form, was ordered or made. Said Muggridge, Crosby and Brigham were decreed bankrupts on the 17th day of August, A. D. 1842.

The agreement in relation to the amount of judgment and the time, when they should be rendered in said Parker and Blanchard's said actions, was executed July 24th, 1840.

A further agreement on the same subject was made July 29th, A. D. 1841, and was carried into effect by the entry of a default in said actions at August term, 1841, and the entry of judgment therein (pursuant to written agreements filed in Court, August term, 1841), was made at August term, 1842.

For the particular terms of said contracts, reference is to be had to the statement thereof in said plaintiffs' bill."

The cause now came on, and was argued by *B. R. Curtis* (with whom was *Fletcher*), for the plaintiffs.

Hazleton, of New Hampshire, for the assignee, argued the cause briefly on that side. His argument was to this effect.

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We supposed, that the case was disposed of by the case of *Foster*, (*ante*, page 132); and that the attachment was dissolved by the decree in bankruptcy, and the injunction properly issued. The contracts gave the plaintiffs no other rights than those given under the attachment laws of New Hampshire. The rights under an attachment in New Hampshire are conditional and contingent; and here, according to the doctrine in *Foster's* case, the attachment is, in effect, qualified, or superseded by the proceedings in bankruptcy. We do not admit, that the plaintiffs under these contracts had any fixed rights. They were not designed to operate as a security or to confer a lien. The plaintiffs had no possession to support or found a lien. The savings in the second section of the bankrupt act of 1841, ch. 9, save only such liens, mortgages, and other securities as are valid by the State laws, and not inconsistent with the bankrupt act. No lien in cases of this sort is created by the laws of New Hampshire, although it is not prohibited. Under the laws of New Hampshire, if the debtor dies, and his estate is insolvent, the attachment upon mesne process by the creditor is dissolved. That, by parity of reasoning, will apply here.

STORY, J. — I do not wish to trouble Mr. Fletcher to reply, because I entertain no doubt whatsoever in this case. It is clear to my mind, that the contracts in this case were good and valid, and founded in a valuable consideration, and that the object of them was to give a perfect security to the plaintiffs for their debts, so far as the property attached could go, and these attachments could by law be made available. These contracts created a clear equitable lien upon the property attached, which a Court of equity would be bound to enforce, and even a Court of law ought to enforce, as far as it could properly do so, in the administration of justice between the parties in the suit. It is by no means necessary in the

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view of a Court of Equity, that the contracts should contain an express stipulation, that the attachments shall stand as a security for the plaintiffs. It is sufficient, if it clearly appear, that such were the obvious intent and objects; and unless that construction should be given, the plaintiffs would have parted with valuable rights without any correspondent benefits. Possession is by no means necessary to create, or to support an equitable lien. On the contrary, in equity and admiralty, liens exist altogether independent of possession; as, for example, the lien of a vendor for the unpaid purchase money, where he has conveyed the land, the lien of a bottomry holder, and the lien of a seaman on the ship for his wages. But here the possession of the personal property under attachment, although in the sheriff, was clearly for the benefit of the plaintiffs; and the attachment of the real estate created a lien thereon by mere operation of law, wholly independent of any possession by the officer.

The Bankrupt Act of 1841, chap. 9, sect. 2, contains an express saving of all liens, mortgages, or other securities on the property, real or personal, of the bankrupt; and equitable liens, mortgages and securities, are as much within the act as legal liens, unless there be some prohibition in the State laws, which renders them invalid; and there is no pretence to say, that any such law exists in New Hampshire. Indeed, if there had been no such saving in the act, the liens, mortgages, and other securities, within the purview of the saving, would have been saved, by mere operation of law, from the natural intentment of the statute, which did not mean to disturb existing vested rights and interests in property.

The case *Ex parte Foster* (*ante*, page 132), differs in all its main elements from the present. There, the attachment was merely *in invitum*, without the consent of the debtor. Here, the attachments, however originally made, were subsequently continued and intended to be perfected as securities

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by the contract of the debtors. In Foster's case, there was no admitted debt due by the debtor, nor any agreement as to not contesting it. In the present case, the defendants have, under their own agreement and contract, been defaulted, the amount of the debts ascertained, and the attachments agreed to be held as security therefor. In Foster's case, the bankrupt, if he obtained his discharge, had a right to plead it in bar to the suit. In the present case, the defendants have no day to plead any such defence; they have been, by their own consent, defaulted, and the amount established; and they are therefore estopped to say, that they have any defence or bar to the judgment. In truth, therefore, Foster's case has no similarity with the present. It stands entirely upon the general and naked right of a creditor to make an attachment, and proceed in his suit against his debtor, without any equity acquired by any act of the defendant to give him new rights in the suit; or to take away any rights of the defendant.

I can have no doubt, that the contracts in the case at bar created a trust, in the sense of a Court of Equity, in the property attached in favor of the plaintiffs, which the defendants might be compelled to perfect and perform, according to its just interpretation. It is no objection, that the trust or security thus obtained is under legal process, or by operation of law. Securities of that sort are very frequent both in England and America, and are deemed the most certain and fixed of any. Thus, a judgment in England, and in many of the States of America, gives a permanent lien upon all the lands of the judgment debtor, and is, on that account, resorted to as a favorite security. It is true, that an attachment by our laws has not the same permanence, but it is limited to a short period after the judgment, within which the plaintiff must take the attached property in execution, or he will lose his lien. But then, in such case, if he loses his attachment, it is his own fault and laches. Now, in the case at bar, the plain-

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tiffs do not ask the Court to enforce their attachment or equitable lien ; but they only ask the Court to leave them, free from the injunction, to pursue their legal and equitable rights under their judgment and execution. It appears to me plain, that they are entitled to it. They have an equitable lien and a superior title to the property over the assignee and the general creditors ; and the assignee must take the property of the bankrupts for the general creditors, subject to this lien and superior title. The case of *Dale v. Smithwick* (2 Vern. R. 151), is strongly in point, as to the nature and obligation of a contract of this sort to create an equitable lien or trust in property. In *Legard v. Hodges* (1 Ves. jr. R. 477), Lord Thurlow said, that it was an universal maxim, that, wherever persons agree concerning a particular subject, in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, it raises a trust.¹ The cases *Ex parte Copeland* (3 Deac. & Chitt. R. 199), and *Ex parte Prescott* (1 Montag. & Ayr. R. 316), and *Ex parte Fowler* (2 Montag. & Ayr. R. 224), establish, that the same rule prevails in bankruptcy ; and that the property will be followed and affected with the trust in the hands of the assignees, in the same manner and to the same extent, as it would be in the hands of the bankrupt. But if no such case ever existed, I should have no doubt, upon principle, that such ought to be the result. But there are many cases, which stand upon analogous grounds.² We all know, that in bankruptcy, the assignee takes only such rights, as the bankrupt himself had, and is subject to the like equities.³

¹ See 2 Story on Equity Jurisp. § 1230, § 1231 ; *Collyer v. Falcon* (1 Turn. & Russ. 469, 475, 476).

² See 2 Story Equity Jurisp. § 1230, § 1231, § 1232.

³ See 1 Cooke Bank. Law, chap. vii. § 2, p. 267 to p. 270, 4th edit. 1799 ; 2 Story, Equity Jurisp. § 1411 ; 1 Deacon on Banks, chap. x. § 3, pp. 320, 321, edit. 1827.

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There is a close analogy, although perhaps the same principles may not apply throughout, between cases like that before the Court, arising in bankruptcy, and cases of the administration of the assets of a deceased testator or intestate, by Courts of Equity, in the ordinary exercise of their jurisdiction, upon a creditor's bill for the benefit of all the creditors. Courts of Equity in such cases always exercise a sound discretion as to restraining any particular creditor from pursuing and enforcing his legal rights under his proceedings and judgment at law, and will not interfere in such a manner as to displace any of his just rights and equities. That is sufficiently apparent from the case of *Drewry v. Thacher* (3 Swanst. R. 529, 546), and especially from the elaborate judgment of Lord Langdale, in *Lee v. Park* (1 Keen R. 714). It appears to me, that the district Courts, sitting in bankruptcy, should uphold the like doctrine, and should exercise a like discretion in not restraining the rights of judgment creditors, who are proceeding to enforce their judgment and executions, not merely upon their ordinary rights as judgment creditors, but upon the footing of equitable rights and liens acquired under contract; for, in such cases, they have a superior equity to that of the general creditors. My opinion, therefore, is, that, in the present case, the plaintiffs have, in virtue of their contract, a superior equity, which ought to be protected by the Court sitting in bankruptcy; and that the injunction, granted in this case, ought to be dissolved; and this will constitute an affirmative answer to the first question propounded in this case.

The second question may be disposed of in a few words. The general rule in bankruptcy is, that in cases of partnership, where one partner becomes bankrupt, his assignee can take only that portion of the partnership assets, which would belong to the bankrupt, after payment of all the partnership debts; and that the solvent partners have a lien upon the

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partnership assets for all the partnership debts, and also for their own shares thereof, before the separate creditors of the bankrupt partner can come in and take any thing.¹ It is true, that in such cases, it may often, from the necessity of the case, and for the purpose of ascertaining the partnership assets and debts, and adjusting and settling the same, and making a final settlement and distribution of the surplus, be indispensable, that the district Court, as a Court of equity, should take into its own hands the exclusive management and administration of all the partnership assets, and inhibit the other partners from intermeddling therewith. But this it will do with caution, and solely for the purposes before stated. And so far from thereby displacing any of the rights, liens, and equities of the other partners, it studiously seeks to maintain and protect them. Now, in the present case, under its peculiar circumstances, there is no reason whatever for the interference of the district Court by way of injunction, or otherwise, to administer the property in controversy. On the contrary, by refusing or dissolving the injunction, it accomplishes the very ends designed by the contracts between all the parties, and allows the partnership property to be applied to the discharge of the partnership debts according to its just and original destination. To the second question, therefore, an affirmative answer ought also to be given.

I shall direct a certificate to be sent to the district Court accordingly.

The certificate was as follows :

Circuit Court of the United States, New Hampshire District. In Bankruptcy. September 12, 1842. Isaac Parker et al., Plaintiffs in Equity, v. Benning Muggridge et als.

In answer to the questions adjourned into this Court by the district Court of New Hampshire, in Bankruptcy, it is ordered,

¹ See Story on Partnership, § 375, § 376.

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that the following answers be sent to that Court as the opinion of this Court.

First. That the contracts stated in the plaintiffs' bill, in connexion with their attachments, as entered into by them with the Avery Factory Company, the said Muggridge, and others, constituted an equitable lien, which remains in force, notwithstanding the decrees of bankruptcy against the said Muggridge and others.

Second. Independently of the said plaintiffs' claim as an equitable lien, which, of itself, constitutes a sufficient ground for the dissolution of the injunction granted in this case, the plaintiffs would be entitled to have the same injunction dissolved, so far as respects the property owned by the said bankrupts, and by their copartners, the Avery Factory Company and Charles Parker, who have not petitioned to be declared bankrupts, and indeed do not appear to be bankrupts. The general rule in all cases of this sort is, that the property of the partnership is first to be applied to the discharge of the partnership debts, and the surplus only ought to be and can be applied to the individual debts of any one partner. It may however occur, that, in the bankruptcy of one partner, it may be necessary for the Court in bankruptcy to take upon itself the administration as well of the partnership estate as of the estate of the bankrupt partner, in order to have a final settlement of all the claims. But no such question is here presented, and it is here alluded to only for the purpose of excluding any different inference from being drawn from the answer to the second question.

JOSEPH STORY,

Associate Justice of the Supreme Court of the United States.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1842, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. PELEG SPRAGUE, District Judge.

CHARLES ARNOLD AND OTHERS v. CHARLES MAYNARD.

WHERE a trader gives a mortgage to one of his creditors, in contemplation of bankruptcy, and for the purpose of giving such creditor a preference over the others, it is an act of bankruptcy within the meaning of the statute.

Where the bankrupt Act speaks of a conveyance or transfer by a debtor "in contemplation of bankruptcy," it does not necessarily mean, in contemplation of his being declared a bankrupt under the statute, but in contemplation of his actually stopping his business, because of his insolvency and incapacity to carry it on.

Where a retailer of merchandise mortgaged his whole stock in trade, of the nominal value of four or five thousand dollars, and comprising the whole mass of his visible property, to a creditor, to secure to him the sum of about seventeen hundred dollars, and against a liability for about five hundred dollars, the debtor owing debts to the amount of five thousand dollars, then over due, and the whole amount arising from a sale of his goods at auction being less than five thousand dollars; *It was held*, that the debtor must be taken in law, to have known, that he was, at the time of making the mortgage, insolvent, and must stop and break up his business, and that the mortgage having been executed in order to give the mortgagee a preference or priority over the rest of his creditors, it was "in contemplation of bankruptcy" within the meaning of the statute.

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Such a mortgage may subject the debtor to be proceeded against as an involuntary bankrupt, notwithstanding he did not, at the time of making it, intend to apply for the benefit of the bankrupt law, or to make himself liable to be proceeded against *in invitum*.

Nor does it make any difference as to the character of the act, whether the mortgage was voluntary and spontaneous on the part of the mortgagor, or was given upon the request or demand of the mortgagee, or upon a verbal promise made in general terms when the debt was contracted, to give security upon request, if at the time of giving it, the mortgagor knew that he was insolvent, and must stop his business, and intended thereby to give a preference or priority to the mortgagee over the rest of his creditors.

THIS was the case of a petition by Charles Arnold, Henry Adams, and Joseph C. Hicks, of Boston, praying, that Charles Maynard, of Lowell, might be declared a bankrupt. The petition set forth, that the said Maynard, on the fifth of April, 1842, made a fraudulent mortgage to John L. Perry, his former partner, conveying all his stock in trade, the same being all his visible property, to secure a debt amounting to \$2200.00. That the said Maynard, on the tenth May, following, made a certain other fraudulent mortgage to one Burton, of all his stock in trade, to secure a debt amounting to \$850.00; that he then falsely confessed, as due to the said Burton, the sum of \$500; and the said Burton afterwards took possession of the said property under the said mortgage, wherefore the petitioners prayed, that the said Maynard might be declared a bankrupt, within the provisions of the act of Congress, in such case made and provided.

When this petition came before the District Court, the following questions were ordered to be adjourned into this Court for a final determination, namely:

First. Whether, if a retailer of merchandise, on the 25th day of April last, mortgaged his whole stock in trade, consisting of goods to the nominal amount of from four to five thousand dollars, and comprising his whole property, excepting debts due to him to the amount of about two hundred

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dollars, to a creditor, to secure him the sum of about seventeen hundred dollars, and against a liability of about five hundred dollars, he, the debtor, owing debts to the amount of five thousand dollars, all then over due, and the cash value of all his goods, if sold at auction, not exceeding twenty-three hundred to four thousand dollars, it is an act of bankruptcy within the meaning of the statute?

Second. Whether, if a retailer of merchandise, knowing himself to be insolvent, makes such mortgage, without intending to apply for the benefit of the bankrupt law, or to make himself liable to be proceeded against *in invitum*, it is a security, conveyance, or transfer of property, made or given in contemplation of bankruptcy, within the meaning of the act?

Third. Whether, if such mortgage be made upon request, or demand of the creditor, and upon a verbal promise made in general terms, when the debt was contracted, to give security upon request; and without any spontaneous act on the part of the debtor, to induce such request, it is a security, conveyance, or transfer, for the purpose of giving the creditor any preference or priority over his general creditors, within the meaning of the statute?

Fourth. Whether, if such mortgage be made in contemplation of bankruptcy, and for the purpose of giving such preference, it is an act of bankruptcy within the meaning of the statute?

The cause was argued upon the adjourned question by *Butler*, of Lowell, for the petitioners, and by *Parker*, of Lowell, for the respondent, Maynard.

STORY, J. — This is the case of a petition by certain creditors of Charles Maynard, proceeding *in invitum*, to have him declared a bankrupt under the bankrupt act of 1841, ch. 9.

There are four questions adjourned into this Court for consideration and decision. The questions arise under that clause

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of the first section of the bankrupt act, which declares, that if any person, being indebted to a certain amount, and being a merchant or a retailer of merchandise, &c. &c. shall "make any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods, or chattels, credits, or evidences of debt," he may, upon petition of his creditors, be declared a bankrupt. All the questions turn upon this, whether the mortgage and conveyance stated in these questions, is to be deemed, under the circumstances therein stated, to be a fraudulent mortgage or conveyance, in the sense of the clause. Fraud, in any conveyance, is, and rarely can be, a mere matter of law; but, for the most part, it is a matter of fact, dependent upon the intent of the parties. But when all the facts and circumstances are ascertained, it may, and, indeed, often does, resolve itself into a mere question of law, as to the intent fairly deducible from those facts and circumstances. There is not the slightest doubt in my mind, that, if the mortgage, in the present case, was made in contemplation of bankruptcy, and for the purpose of giving a preference to the mortgagee over the other creditors of the mortgagor, it would be an act of bankruptcy within the clause of the bankrupt act already referred to. Indeed, such a case, falls directly within the second section of the Act, which, among other things, declares, That all "securities, conveyances, or transfers of property, &c. made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, &c. &c. any preference or priority over the general creditors of such bankrupt, &c. shall be deemed utterly void, and a fraud upon this act." So that the fourth question must be answered in the affirmative, upon the very language of the Act, as the mortgage under the circumstances stated in the question, was a "fraud upon the Act."

The first question contains, what I suppose are the real merits of this case. And for the purpose of answering it, I

must assume, that the retailer was conscious of his own insolvency, and of his utter inability to pay all his creditors, or to carry on his business any longer, and designed to give the mortgagee a preference and priority over all his other creditors by the mortgage. Now, under such circumstances, I must presume, that in point of law, he knew the natural consequences of such an act, and that he must thereby contemplate his own immediate bankruptcy, that is, his utter inability to pay his debts, and to proceed in business, and his own right to petition for the benefit of the bankrupt act of 1841, and his liability to be proceeded against at his own choice, as well as his liability to be proceeded against by his creditors *in invitum*, in bankruptcy, at their election, for such act, if it was intended to give a preference to the mortgagee over all his other creditors, as being against the provisions and policy of the Act. In this view of the matter, and upon the facts stated, I should answer the first question in the affirmative, and say, that the mortgage so given, was an act of bankruptcy, within the meaning of the statute.

The second question involves more difficulty in being answered in direct terms, because it states, what I apprehend cannot, in point of law, be stated, that is, that a man does not intend and contemplate precisely what the law pronounces the necessary result of his acts. No man can be permitted to aver his ignorance of the law as a qualification of his acts. On the contrary, every man is presumed to know the law, and he is bound to know, what are the legal results of his acts; or, as Lord Ellenborough said in *Newton v. Chantler* (7 East R. 143), every man must be taken to contemplate the ordinary consequences of his own act at the time of the act done. *Ignorantia legis neminem excusat*, is a maxim laid up among the earliest rudiments of the law. If the question meant to be asked, was, whether, if the mortgagor, at the time of executing the mortgage, knowing his own insolvency, and

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inability further to carry on his business, but having no immediate intention on his own part, to seek by petition the benefit of the bankrupt act, or thereby to enable his other creditors to proceed against him *in invitum*, to have him declared a bankrupt under that act, but actually designing and intending thereby to give a preference to the mortgagee over all his other creditors, it was such a security, conveyance, or transfer as was fraudulent, and in contemplation of bankruptcy within the meaning of the bankrupt act, then I say, that his mere private intention cannot overcome the legal intention and purport of the act; and it is to be treated, in the sense of the statute, as made in contemplation of bankruptcy, although it was not done by him with the intention to be declared a bankrupt. When the statute speaks of a conveyance or transfer in contemplation of bankruptcy, it does not necessarily mean, in contemplation of being declared a bankrupt under the statute; but in contemplation of actually stopping his business, because he is insolvent and utterly incapable of carrying it on. And this certainly was the primary sense, in which the language was used and understood in the English bankrupt laws, from which it has been borrowed and incorporated into our statute, whatever may have been the more modern construction put upon it. The very word bankrupt, supposes a man to be broken up in his business, and insolvent, or as Mr. Justice Blackstone (2 Black. Comm. 472, note), puts it, the word is derived from *bancus*, or *banque*, which signifies the table or counter of a tradesman, and *ruptus*, broken, denoting thereby one, whose shop or place of trade is broken and gone. Now, when a man, being about to fail, and to stop all his business, with a perfect consciousness, that he is insolvent, and with the intention to break up all his business, makes a conveyance to a particular creditor, with a view to give him a preference over all his other creditors, of the whole, or of the mass of his visible property, we must un-

derstand, that he does the act with a design to evade the provisions of the bankrupt act, which provide for an equal distribution of his property among all his creditors. If such a conveyance should be held valid, what is there to prevent the party at a future time, at his leisure, or his pleasure, from applying for the benefit of the Act? If the present mortgage should be held valid, what is there to prevent Maynard from now applying for the benefit of the bankrupt act, since he might say, that at the time, when he gave the mortgage, he had no fixed intention of that sort, and did not make it in contemplation of then taking the benefit of the Act?

I agree, that the mere fact of a man's being insolvent, and knowing the fact, does not necessarily establish, that he means to stop business and break up his establishment; for he may hope and believe, that he can still carry it on, and perhaps redeem himself from insolvency. But, when he is deeply in debt, and intending to fail, and break up his whole business at once, he makes a conveyance to a particular creditor, to give him a preference over all the rest, it seems to me irresistible evidence, that he does the act in contemplation of bankruptcy. I do not think, that it is necessary, for this purpose, that he should contemplate the conveyance, as an act of bankruptcy, or that he should make it with a present and immediate intention to take the benefit of that statute. It is sufficient, that he must know, that in making that conveyance, he defeats the provisions of the statute, and yet that if it be not a fraud upon the Act, he may still at any time, at his pleasure, take the benefit of the Act, and thereby make the preference conclusive and perfect. Now, such a result is manifestly at war with the whole objects of the statute. It would put it in the power of the debtor to avail himself of all the benefits of the Act, and yet would enable him at the same time, upon his own secret and unknown intention — inscruta-

ble to others, and admitting of no possible certainty — to do the very acts, which the statute was designed to prevent.

I do not think, that the English decisions upon this subject can have any very direct application to govern the construction of our statute. Their bankrupt acts apply, for the most part, to cases of involuntary bankrupts; whereas the main purposes of ours are for the benefit of voluntary bankrupts. But the cases of *Flook v. Jones* (4 Bing. R. 20), and *Poland v. Glyn* (4 Bing. R. 22, note), and *Ridley v. Gyde* (9 Bing. R. 349), proceed upon principles quite analogous. I am aware, that the authority of some of these cases, so far as they apply to the English bankrupt laws, has been questioned; that they have been thought to go too far; and that they did not meet the approbation of the Court in *Morgan v. Brundrett* (5 Barn. and Adolph. R. 289). But this last case, as well as the other cases, shows, that the words “in contemplation of bankruptcy,” are not necessarily limited to acts done, which would, *per se*, be acts, for which the party might, or would be declared a bankrupt under the bankrupt laws; but which must and would produce on his part, a positive state of bankruptcy, in which he might become a proper subject of the bankrupt laws. Mr. Justice Parke, in this case, said; “The meaning of these words, ‘in contemplation of bankruptcy,’ I take to be, that the payment or delivery must be with intent to defeat the general distribution of effects, which takes place under a commission of bankrupt.” Mr. Justice Patteson said; “The recent cases have gone too great a length; they seem to have proceeded on the principle, that if a party be insolvent at the time, when he makes a payment or a delivery, and afterwards becomes bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made the payment. But I think, that is not correct; for a man may be insolvent, and yet not contemplate bankruptcy.” Lord Chief Justice Gibbs, in the case of *Fidgeon v. Sharpe* (5 Taunt.

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539-541), was still more expressive. "With respect," (said he) "to this doctrine of contemplation in cases of bankruptcy, we have nothing, either in the common or statute law, to show what it is. The cases, in which this doctrine was introduced, make it depend upon the *quo animo*: if a trader thought he should not ultimately have enough to pay all his creditors, it must be presumed, that if he gives full payment to one, he does it in contemplation of bankruptcy. But if a man, honestly believing he shall have enough ultimately to pay all, but having bought goods with intent to apply them to the particular purposes of his trade, and finding, that it is necessary, that he should discontinue his trade, and therefore cannot make the intended use of the goods, thinks it fair and right to return the goods to the person of whom he purchased them, I cannot say, that this is done with a view or contemplation of bankruptcy." The case of *Palling v. Tucker* (4 Barn. and Ald. 382), is very strong to the purpose of showing, that a voluntary conveyance to one creditor, with the design to give him a preference, to the prejudice of the rest of the creditors, is a fraud upon the bankrupt laws, and an act of bankruptcy. The same doctrine was held in *Newton v. Chantler* (7 East R. 137, 143, 144). In *Wedge v. Newlyn* (4 Barn. and Adolph. 831), it was expressly held, that a trader conveying away property to a creditor, to such an extent as will prevent him from continuing his business, and render him insolvent, commits thereby an act of bankruptcy.¹ Indeed, I should deduce the general conclusion from the English cases to be, that a conveyance by a person, knowing himself to be insol-

¹ See, also, *Newton v. Chantler* (7 East, R. 145); per Le Blanc J. *Compton v. Bedford* (1 W. Black. R. 362); *Carr v. Burdiss* (1 Crompt. Mees. & Rosc. 447; S. C. 8 Tyrwhitt, R. 136); per Parke, Baron, *Baxter v. Pritchard* (1 Adolp. & Ellis, 456); *Abbott v. Burbage* (2 Bing. New Cases, 444).

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vent, to one creditor, with a design of giving him a preference over the other creditors, in the event of his own expected bankruptcy and stoppage of business, was of itself an act of bankruptcy, as a fraud upon the bankrupt laws. But, whether it be so or not under those laws, I think it is the natural, if not the necessary, intention, deducible from the whole structure and policy of the bankrupt act of 1841. With this explanation, I should answer the second question also in the affirmative.

As to the third question, whatever may be the case under the peculiar provisions of the bankrupt laws of England, it appears to me, that it ought to be answered in the affirmative, under our bankrupt act of 1841. The previous request or demand of the creditor, or the verbal promise of the debtor, when he contracted the debt, to give security upon request, does not make, and ought not to make any difference as to the rights of the other creditors. Whether the mortgage is spontaneous on the part of the debtor, or requested by the creditor; still, if each knows, that the debtor is insolvent, and that he contemplates immediate bankruptcy, and breaking up of his business, and the object of the mortgage is to secure a preference to that creditor over the other creditors, I think, that it is a fraud upon the bankrupt act of 1841, and is, therefore, an act of bankruptcy within the meaning of the statute.

I shall direct a certificate accordingly to be sent to the District Court.

The certificate was as follows.

It is ordered by this Court, that the following certificate be sent to the District Court, in answer to the questions adjourned by the said Court into this Court, in this case.

1. The first question is answered by this Court in the

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affirmative, it being the opinion of this Court, that upon the facts stated, the retailer, who made the mortgage to the creditor, the mortgagee, in the case, must be taken to have known, that he was, at the time of making the mortgage, insolvent, and must stop and break up his business; and that he executed that mortgage in order to give the mortgagee a preference or priority over the rest of his creditors, in contemplation of thus stopping and breaking up his business, and thus being in a *state* of bankruptcy.

2. The second question is also answered in the affirmative, it not being essential in the opinion of this Court, that the retailer should contemplate or intend, at the time of making the mortgage, to apply for the benefit of the bankrupt act of 1841, or thereby to subject himself to be proceeded against by his creditors as an involuntary bankrupt, under the bankrupt act of 1841. But that it is sufficient to make the mortgage so given, a security, conveyance, and transfer, in contemplation of bankruptcy, within the meaning of the bankrupt act, that he should, at the time, know himself to be insolvent, and unable further to carry on his business, and that he contemplated a stoppage and breaking up of his business, and intended by such mortgage to give a preference or priority to the mortgagee over the rest of his creditors, in contemplation of such stoppage of business, and state of bankruptcy.

3. The third question is also answered by this Court in the affirmative, this Court being of opinion, that, under the bankrupt act of 1841, it is wholly immaterial, whether the mortgage was voluntary and spontaneous on the part of the mortgagor, or was given upon the request or demand of the mortgagee, or upon a verbal promise made in general terms, when the debt was contracted, to give security upon request, if at the time of giving the mortgage, the mortgagor knew, that he was insolvent, and could not further continue his business,

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but must stop the same, and he intended by such mortgage to give a preference or priority to the mortgagee over the rest of his creditors, in contemplation of such stoppage of business, and *state* of bankruptcy.

4. The fourth question is answered in the affirmative, as being clearly an act of bankruptcy within the meaning of the bankrupt act of 1841.

JOSEPH STORY,

One of the Justices of the Supreme Court of the United States.

EX PARTE NEWHALL, ASSIGNEE OF BROWN.

ALL the property and rights of property of the bankrupt, *at the time of the decree of bankruptcy*, pass to the assignee to be distributed amongst the creditors, with the other assets of the bankrupt.

Property, which comes to a person, seeking the benefit of the Bankrupt Act, by descent, or as distributee, in the intermediate time between his filing his petition and his being declared a bankrupt, *passes to the assignee as a part of the assets of the bankrupt.*

The assignee takes the property and rights of property of the bankrupt, subject to all such rights and equities of third persons, as are attached to it in the hands of the bankrupt.

Where the bankrupt, after filing his petition, and before a decree of bankruptcy, became entitled to certain property, as heir to his mother, to whom, when alive, he was indebted; *It was held*, that the assignee of the bankrupt was only entitled to the bankrupt's moiety or distributive share, after deducting therefrom his debt to the estate.

THIS case came before the District Court upon a petition by the assignee of the bankrupt, setting forth, that Brown, the bankrupt, on the 2d February last, filed his petition to be decreed a bankrupt, and on the 3d May thereafter, was duly decreed a bankrupt. On the 20th February, Mary Brown, a widow, the mother of the bankrupt, died intestate, and Charles

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Brown was duly administrator of her estate. The said Mary, at the time of her death, was seized and possessed of certain goods and estate to the value of about four thousand dollars, and the said Charles, and the bankrupt, were the sole heirs. Wherefore, the assignee prayed, that the bankrupt be directed to file a supplemental schedule to his petition in bankruptcy, and therein to enumerate and set forth one half of the net proceeds of his mother's estate, now in the hands of the said administrator; so that the same may be applied to the payment of his just debts, according to the statute of the United States, in that behalf made and provided.

It appeared, upon an agreed statement of facts, that the matters of fact set forth in the petition, were true, and also, that the bankrupt was indebted to Mary Brown during her lifetime, to the amount of \$1200. Upon these facts, the following points were raised by the respective parties, namely: (1). The administrator contended, that he must retain in his hands the amount due from the bankrupt to the intestate's estate, and that he ought not to pay either to the bankrupt, or to the assignee, any thing more than the balance of the bankrupt's share of the estate of Mary Brown. (2). The assignee contended, that the whole share of the bankrupt in the said estate, without deducting the sum due by him to said deceased, should be added to the assets of the petitioner set forth in his schedule B. (3). The bankrupt contended, that the whole of his share in the estate belonged to himself, and that the administrator could not retain, on account of the claim of the said Mary Brown, any more than the *pro rata* dividend, which might be hereafter declared out of his assets.

Upon the hearing in the District Court, it was ordered, that two questions be adjourned into this Court: *First*, whether upon the accompanying statement of facts, the share in the property of Mary Brown, descended to the said George Brown, as one of her heirs at law, belongs to the said assignee, for

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the benefit of the creditors of the said bankrupt, or to said George, the bankrupt, for his own use and benefit? *Second.* Whether, if the said share belongs to the said assignee, the said administrator is entitled to set off against the claim of the assignee, the amount of the debt due from the bankrupt to the estate of the said Mary Brown?

The case was now submitted by *John G. King, Jr.*, for the assignee, and by *R. Rantoul* and *F. Dexter*, for the bankrupt.

STORY, J. — There are two questions adjourned into this Court for consideration. The first, in effect, is, whether property, which comes to a person, seeking the benefit of the bankrupt act, by descent, or as distributee, in the intermediate time between his filing his petition and his being declared a bankrupt by the decree of the District Court, passes to the assignee as a part of the assets of the bankrupt, or belongs to the bankrupt himself. My opinion is, that it passes to the assignee as a part of the assets of the bankrupt. The third section of the bankrupt act of 1841, chapter 9, declares, that all property and rights of property of every bankrupt, who shall, by a decree of the proper Court, be declared a bankrupt within the act, shall by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of the bankrupt, and the same shall be vested by force of the same decree in such assignee, as from time to time shall be appointed by the proper Court for this purpose. It seems to me, that the natural, and even necessary interpretation of this clause is, that all the property and rights of property of the bankrupt, at the time of the decree, are intended to be passed to the assignee. It is true, that the decree will also by relation cover all the property, which he had at the time of filing the petition, and at all intermediate times, to effect the manifest purposes of the act. But this is rather a conclusion,

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deducible from the general provisions and objects of the whole act, than a positive provision. It results by necessary implication in order to effectuate the obvious purposes of the act, and to prevent what otherwise would or might be irremediable mischiefs. But the language of the third section speaks in direct terms of property and rights of property in the bankrupt, at the time of the decree, as being divested out of him by the decree, and vested in the assignee. In the present case, there can be no doubt, that, by Mrs. Brown's death, in February, 1842, the distributive share of the bankrupt in her estate, was property or rights of property vested in the bankrupt. It, therefore, falls directly under the category of the act. I take the plain distinction, running throughout the act, to be, that it is not intended to touch any property or rights of property, which may be acquired by a descent to him after the decree in bankruptcy, by which he has been decreed to be a bankrupt; but that it covers all his property, acquired by or descended to him, or belonging to him, before the decree. The English statutes of bankruptcy go further, and vest in the assignee all the property of the bankrupt, which comes to him by descent, distribution, or otherwise, before the discharge is granted. But this doctrine stands only upon the positive language of those statutes, and not upon any general principles of law, applicable to the subject.

The second question appears to me equally free from reasonable doubt. I take the clear rule in bankruptcy to be, that the assignee takes the property and rights of property of the bankrupt, subject to all the rights and equities of third persons, which are attached to it in the hands of the bankrupt. What is the distributive share of the bankrupt in his mother's estate? Plainly one moiety of all the assets of her estate. The debt due by the bankrupt to her estate, constitutes a part of her assets, and he cannot take his distributive share of the whole assets, without allowing and paying that debt out of it.

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Any other course would be a monstrous injustice, at war equally with law, and equity, and common justice. Suppose his debt were equal in amount to his whole distributive share in the other part of her assets, could it for a moment be imagined, that his assignee would be entitled to take the whole of the distributive share, in the other assets of the estate, and leave the debt to be proved against the estate of the bankrupt? The present case may not be a case of mutual debts or mutual credits, in the sense of the 5th section of the bankrupt act of 1841, ch. 9; and, therefore, to be set off. But if it is not, still, according to the rules of a Court of Equity, the assignee cannot now claim the distributive share of her assets, without making all equitable allowances attached to it; and this debt is clearly legally, as well as equitably, due to her estate. The rule of distribution should be the same, as if this very debt were now paid to her estate.

To make my opinion more clear, I will suppose the facts to be, that the other assets of Mrs. Brown, in the hands of her administrator, amount to \$4000, and the debt due by the bankrupt to her estate is \$1200. The whole assets of Mrs. Brown, are then \$5200; and the distributive share or moiety of the bankrupt of these assets is \$2600, from which should be deducted, as unpaid, the debt of \$1200, leaving his net distributive share, after the set-off or deduction of his debt, to be \$1400.

I shall direct a certificate to be sent to the District Court in conformity to this opinion.

Circuit Court of the United States, Boston, September 12, 1842. It is ordered by this Court, that the following answers be certified to the District Court, upon the questions adjourned into this Court for a final determination. *First*, upon the first question. It is the opinion of this Court, upon the statement of facts, that the assignee of the said George Brown is entitled,

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for the benefit of the creditors of the said George Brown, to his distributive share in the estate of Mary Brown deceased, as set forth in the said question, and that the said George Brown is not entitled to the same for his own use and benefit.

Secondly, upon the second question. It is the opinion of this Court, that the administrator of the estate of Mary Brown deceased, is entitled to set off or deduct the amount of the debt, due by the said bankrupt to the estate of the said Mary Brown, against the claim of the said assignee, for his distributive share of all her assets, including this debt. In other words, the debt is to be treated as a part of the assets of the estate of the said Mary Brown, to be distributed between her two heirs and distributees, and the debt of the said bankrupt is to be deducted from his moiety or distributive share, thus ascertained of the whole assets.

JOSEPH STORY,

One of the Justices of the Supreme Court of the United States.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MAINE, MAY TERM, 1842, AT PORTLAND.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. ASHUR WARE, District Judge.

WOOD v. CARR.

SET-OFF :—All actions and matters of difference between the parties having been referred to referees, they made separate reports, upon which executions issued and were placed in the hands of the sheriff. Before the executions were issued, one of the parties assigned the amount he might recover to third persons, who had full notice of all the facts. *Held*, that the assignee was not protected by the proviso of the statute of Maine, of the 13th March, 1821, chap. 6, sect. 4, the claim not having been “assigned to him *bond fide* and without fraud ;” and that the original parties having mutual executions against each other, the sheriff had a right to set off one against another, notwithstanding the notice given to him of the assignment.

THE defendant, being sheriff of the county of Penobscot, had placed in his hands for collection, an execution issued on a judgment recovered by the Bangor House Proprietary against the plaintiff. He had also placed in his hands for collection an execution issued on a judgment recovered by the plaintiff against the Bangor House Proprietary. Thereupon, at the request of said Proprietary, the defendant satisfied the plaintiff's execution, by setting the amount thereof, due and unpaid off, upon the execution in favor of the Bangor House Proprietary, indorsing the said amount on the said execution

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in part payment and satisfaction thereof. This action was brought against the defendant for an alleged misfeasance in making the said set-off. It appeared in evidence, that the plaintiff and the said Proprietary having got into difficulty and dispute, several actions were brought by the Proprietary against the plaintiff; all of which were referred, with all matters of difference between the parties, to three persons. The referees made separate reports in and by way of final disposition of each of the said actions, and the judgments, on which the said several executions issued, were judgments in pursuance of and upon acceptance of the said referee's report. After the said referees had so agreed to report, the plaintiff assigned the amount he might recover in the action, in which judgment was entered up in his favor, and execution issued, as herein before stated, to third persons, for the consideration and purposes therein expressed. And this action was brought by such third persons, in the name of the plaintiff, for the benefit of such third persons, who well knew the whole transaction and facts here stated. A verdict was taken for the plaintiff, by consent, subject to the opinion of the Court. If the sheriff had a right to make the set-off, he having been notified of the assignment, the verdict was to be set aside. If he had by law no right so to do, but was bound to collect the amount, and pay the same over to the assignee of Wood, said Wood being insolvent at the time of said assignment, then judgment was to be entered on the verdict.

The statute of Maine, of the 13th of March, 1821, ch. 6, § 4, provides that whenever any sheriff shall at the same time have several executions wherein the creditor in one execution is debtor in the other, he may cause one execution to answer and satisfy the other so far as the same will extend; with a proviso (among other things) that it shall not "affect the rights of any person, to whom, or for whose benefit, the same judgment, or execution, or the original cause of action thereof, may have been assigned *bonâ fide*, and without fraud."

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The case was briefly argued at this term, by *W. P. Preble* for the defendant, and by *C. S. Davis* for the plaintiff. For the defendant was cited *Hatch v. Greene* (12 Mass. R. 195); and for the plaintiff *Green v. Darling* (5 Mason's R. 202), and *Howe v. Sheppard* (2 Sumner's R. 409).

STORY, J., after stating the facts, and reviewing the decisions, said: I have no doubt whatsoever, that the assignment having been made with a full knowledge of all the facts, the assignee must take the same, subject to all the known equities between the original parties. To give it any other and further effect would, in my judgment, contravene the policy of the statute of Maine, and make it an instrument of injustice, as well as of fraud. In no sense can an assignee be said to be a *bonâ fide* holder of an assignment without fraud, who, by procuring that assignment, seeks to defeat the just rights of the other party. Notice is universally deemed, if not at law, at least in equity, to place the party in the situation of a trustee, as to all the rights, which he acquires, affected by that notice. He, who has notice of equities, which he seeks to defeat, is, in the eyes of a Court of equity, deemed guilty of a constructive fraud; and he is not a *bonâ fide* holder, although he may have paid a valuable consideration therefor. In the sense, then, of the statute of Maine the assignee is not within the saving of the proviso; for the claim has not been "assigned to him *bonâ fide* and without fraud."

It appears to me, therefore, that the verdict for the plaintiff ought to be set aside. I wish to add, that there is nothing in the case of *Greene v. Darling* (5 Mason's R. 202), or that of *Howe v. Sheppard* (2 Sumner's R. 409), that, in the slightest degree, infringes the doctrine stated in the present opinion.

Verdict set aside.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1842, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. PELEG SPRAGUE, District Judge.

UNITED STATES *v.* THOMAS WIGGLESWORTH.

THE Act of July 14th, 1832, ch. 225, sect. 24, levies a duty of 15 per cent. *ad valorem*, on indigo. The Act of March 2d, 1833, ch. 46, sect. 5, declares, that it shall be free from duty after June 30th, 1842. The Act of 1841, ch. 24, sect. 1, levies a duty of 20 per cent. *ad valorem*, on all articles imported into the United States after September 30th, 1841, which were then free or chargeable with a duty less than 20 per cent. *ad valorem*, except on certain enumerated articles, among which is indigo, "which shall pay respectively the same rates of duties imposed upon them under existing laws." *Held*, that the Act of 1841 did not lay a permanent duty of 15 per cent. *ad valorem*, on indigo, but left the duty thereupon as it stood under the Act of 1833, and to expire after the 30th of June, 1842, and, therefore, that no duty was due upon it by the Act of August 30th, 1842, ch. 270, sect. 25.

Statutes levying taxes on duties, on subjects or citizens, are to be construed most strongly against the government, and in favor of the subjects or citizens, and their provisions are not to be extended by implication beyond the clear import of the language used.

DEBT for the recovery of duties, alleged to be due upon certain cases of indigo, imported by the defendant into the port

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of Boston. The case came before the Court upon an agreed statement of facts as follows :

The Defendant was the owner of the said cases of indigo, which were laden on board of the American ship —, at a port east of the Cape of Good Hope ; and which sailed therefrom for Boston before the first day of September, 1842, and arrived safely.

At the time of her arrival, the collector, considering this article to be free of duty under the act of 1833, ch. 354, section 5, and subsequent acts, permitted it to be entered and landed accordingly. But he was subsequently instructed by the Treasury Department, that indigo was at that time subject to a duty of 15 per cent., by virtue of the acts of 1832, ch. 224, section 24, and 1833, ch. 354, section 5, and 1841, ch. 24, section 1, and 1842 (establishing the last tariff), ch. 270, section 25. And this suit is brought for the recovery of such alleged duty on those cases.

The cause was argued by *F. Dexter*, District Attorney, for the United States ; and by *C. G. Loring*, for the defendant.

STORY, J. — The question in this case is, whether, under the agreed statement of facts, the indigo imported was, under the duty act of the 11th day of September, 1841, ch. 24, and the act of the 30th of August, 1842, ch. 270, liable to pay the 15 per cent. duty, imposed by the act of the 2d day of March, 1833, ch. 54, commonly called the Compromise Act, or was entitled to importation free of duty. The Act of 1842, ch. 270, in the 25th section, expressly exempts from its operation all cases of goods "shipped in a vessel bound to any port of the United States, actually having left her last port of lading eastward of the Cape of Good Hope, or beyond Cape Horn, prior to the 1st of September, 1842," in which predicament

the indigo, upon which the present duty is claimed, actually is. The 25th section then proceeds as follows: "And all legal provisions and regulations existing immediately before the thirteenth day of June, 1842, shall be applied to importations, which may be made in vessels, which shall have left such last port of lading eastward of the Cape of Good Hope, or beyond Cape Horn, prior to the said 1st day of September, 1842." So that, according to the language and purport of this enactment, goods in the predicament above stated are to pay duties or not, according to the provisions and regulations of the laws in force immediately before the 30th of June, 1842.

What, then, were the provisions and regulations as to duties on indigo, in force immediately before the 30th of June, 1842? They were in effect those, which were established by the act of the 14th of July, 1832, ch. 225, as modified by the act of the 2d of March, 1833, ch. 46, and by the act of 1841, ch. 24. The act of 1832, in the 24th clause of the second section, levied a duty on indigo of 15 per cent. *ad valorem*. The Act of 1833, in the 5th section, declared, that indigo should be free from duty from and after the 30th day of June, 1842. Now, if the case had stopped here, upon these two acts, there would have been no ground of doubt, that indigo was to be liable until the 30th day of June, 1842, to the duty of 15 per cent. *ad valorem*; and that indigo imported after that period was to be free from duty.

But then came the duty act of 1841, ch. 24, which provides, "that on all articles imported into the United States, from and after the 30th day of September, 1841, there shall be laid, collected, and paid on all articles, which are now admitted free of duty, or which are chargeable with a duty of less than 20 per cent. *ad valorem*, a duty of 20 per cent, *ad valorem*, except on the following enumerated articles (among

which indigo is enumerated), which shall pay respectively the same rates of duties imposed on them *under* existing laws."

The act of 1842, ch. 270, would by its general provisions have reached the present case, but for the exception contained in the 25th section already alluded to; and, therefore, that act may be laid out of our consideration, except so far as it leaves the present case to the operation of the legal provisions and regulations existing immediately before the 30th day of June, 1842.

How then stands the case before the Court? By the act of 1833, indigo was subject to a duty of 15 per cent. *ad valorem*, until the 30th day of June, 1842. At the time of the passage of the act of 1841 it was still subject to that duty (the prescribed period of the repeal of the duty not having then arrived); and the act of 1841, by the exception, left indigo to pay the rate of duty (15 per cent.), imposed on it "*under* the existing laws." Some stress was laid at the argument upon the word "*under*," as used in the first section of the act of 1841; and it was said that "*under* existing laws" means now imposed by virtue of the existing laws, whereas, "*by* existing laws" would mean imposed according to the provisions of existing laws. Upon this interpretation it is said, "*imposed under* a law" means rightfully collected under a law; and, "*imposed by* a law," means provided for by the law. I confess, that I do not feel the force of the distinction as applied to a case of this sort. It strikes me, that a duty imposed by a law, and a duty imposed under a law, are precise equivalents in meaning. No duty is collectable or payable unless it is authorised by law; and if authorised by law, it is then properly said to be imposed by the law, and to be collectable and payable under the law; that is, by or in virtue of the law. We familiarly say, that the Courts of the United States have a certain jurisdiction under the judiciary act of 1789, ch. 20, by which we certainly mean no more than that

the jurisdiction is conferred by that act; that is, it is exercised in virtue of and under the authority of that act. It would be quite too perilous to found an interpretation of any law upon a verbal distinction so refined and subtle, and *a fortiori*, to found such a distinction in cases of Revenue Laws, which are designed to operate upon the public at large, and are supposed to use words in the senses belonging to the familiar language of common life and commercial business.

The question then resolves itself into this: Whether the first section of the act of 1841, upon its true intendment and interpretation, meant to impose a permanent duty of 15 per cent. *ad valorem*, upon indigo and the other excepted articles, or whether it meant to levy that duty as long as the act of 1833 authorised the same duty to be levied, and no longer; that is to say, until the 30th of June, 1842, and then to leave it free. The question is certainly not without embarrassment and difficulty, from the obscurity of the language used, as well as from the loose mode of engrafting the provisions of one Revenue Statute apparently as a permanent character upon the provisions of another Revenue Statute, apparently of a temporary character and duration, and imposing varying duties, at different times, upon the same articles.

Upon the best consideration which I have been able to bestow upon the subject, my opinion is, that the act of 1841 left the act of 1833 to its full and entire operation upon indigo, and the other excepted articles, without adding to, or varying, or prolonging the period, during which the duty imposed thereon was to be levied. In other words, the act of 1841 did not intend to levy a permanent duty of 15 per cent. *ad valorem* upon indigo, but left the duty, as it stood, under the act of 1833, and to expire, as that act had provided, after the 30th of June, 1842.

My reasons for this conclusion are these: In the first place, it is, as I conceive, a general rule in the interpretation of all

Statutes, levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters, not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such Statutes are construed most strongly against the Government, and in favor of the subjects or citizens, because burthens are not to be imposed, nor presumed to be imposed, beyond what the Statutes expressly and clearly import. Revenue Statutes are in no just sense either remedial laws, or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed. Hence in the present case, if it be a matter of real doubt, whether the intention of the act of 1841 was to levy a permanent duty on indigo, that doubt will absolve the importer from paying the duty beyond the period, when it would otherwise be free.

In the next place, I think, that the natural meaning of the language of the first section of the act of 1841, justifies, if it does not absolutely require, this interpretation. The language is not, that the present existing rates of duty shall continue hereafter to be levied upon indigo, and the other excepted articles, which would be the appropriate language, if Congress intended to make the levy of the duty permanent; but the language is, that indigo and the other excepted articles "shall pay respectively the same rates of duty imposed on them under existing laws"; that is, the existing laws shall regulate the rates of duties upon these articles, throughout, and the act of 1841 shall have no operation whatsoever upon them. The exception takes them all out of the purview of the act, and leaves them, where it found them, under the dominion of the act of 1833, and the other acts then in force, and of those only.

Now, construing the language in this way, it is plain, that the duty on indigo ceased on the 30th of June, 1842, by the

very limitations of the act of 1833. The argument, addressed at the bar to this point, has great cogency. Suppose the act of 1833 had laid a duty on indigo, varying in its amount at different periods, between the passage of the act of 1833 and that of the 30th of June, 1842, either higher or lower than 15 per cent.; what ground would there be to say, that the act of 1841 contemplated a repeal of such a varying duty, and fixed a uniform permanent duty on the articles of 15 per cent.? I profess, that I am unable to see any ground, upon which such a construction could be maintained. And yet, if it be not maintainable, there is the same reason for giving effect to the repeal of the whole duty provided for by the act of 1833, as there would be for giving effect to such a varying duty. In the one case there would be a partial cesser, in the other a total cesser of the original duty. But the interpretation of the act of 1841 must be the same in both cases.

My view of the whole matter, then, is this, that the duty imposed on indigo "under the existing laws," before the act of 1841, was a duty of a limited duration: it was 15 per cent. until the 30th of June, 1842, and then it was declared that the article was free of duty. That declaration was as much a part of the "existing laws" as the levy of the duty itself. If the duty up to the 30th of June, 1842, was leviable "under the existing laws," the exemption was, after that period, equally "under the existing laws." They were both inseparable adjuncts in the contemplation of the act of 1833. They are not severed in terms, nor, in my judgment, are they severable by any intendment of the act of 1841, in its actual provisions or its avowed objects.

And, upon the whole, my opinion is, that judgment upon the agreed facts ought to be for the defendant.

IN THE MATTER OF ENOCH COOK.

THE doctrine in the case of *Ex parte Foster* (*ante*, p. 132), re-stated and affirmed.

A judgment upon property, attached on the writ, in Massachusetts, is a lien within the proviso of the second section of the Bankrupt Act of 1841, and is saved thereby, and is wholly unaffected by the proceedings in bankruptcy, when it has been regularly obtained, before any petition, or decree, or discharge in bankruptcy.

Where property was attached upon *mesne process*, and after judgment was obtained, the defendant filed his petition to be decreed a bankrupt; *It was held*, that the right of the attaching creditor had attached absolutely to the property, and by the law of Massachusetts, remained a fixed and permanent lien, for thirty days after the judgment, by means of which the creditor, at his election, might obtain a preference of satisfaction out of the property attached over all other creditors.

THIS case was adjourned in the Circuit Court upon the following statement of facts:

The president, directors, and company of the Charlestown Bank, a corporation, created by a law of the Commonwealth of Massachusetts, and having its place of business in Charlestown, in the said Commonwealth, heretofore sued out three several writs of attachment against the said Enoch Cook, upon which, personal property was attached, and which was returnable to the Court of Common Pleas for the county of Middlesex, and Commonwealth aforesaid, at the September term thereof, A. D. 1842. The actions were entered, and judgment was recovered against the said Cook by default, on the twelfth day of September aforesaid. On the thirteenth day of the said September, the said Cook filed his petition, in common form, for relief under the bankrupt act, and in the schedule annexed to his petition, was enumerated the property heretofore attached by the said corporation. Order of notice upon the said petition was issued returnable on the first Tuesday of November. Executions duly issued upon

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the said judgments recovered by the said corporation against the said Cook, and they were duly levied upon the property attached on the sixth day of October, A. D. 1842. A portion of the said property was advertised for sale on the twelfth day of the said October, and another portion for a subsequent day. The said Cook, on the eleventh day of the said October, presented a petition to the Honorable, the District Judge of the United States, for the District of Massachusetts, for an injunction against the sale of the said property and the satisfaction of the said judgments out of the same, on which order of notice to show cause issued, returnable on the twelfth day of the said October. The question was briefly spoken to before the District Judge, but was not decided by him, and, at his suggestion, the parties entered into an agreement, by which, the property and the proceeds of the property were to be retained in the hands of officers, by whom it had been attached, subject to the decision of the Circuit Court. Under these circumstances, the question is now presented to the consideration of the Circuit Court, whether the said injunction shall be dissolved. The said Enoch Cook has been declared a bankrupt, according to his said petition.

Upon this statement, the question whether the injunction there referred to shall be dissolved, was adjourned by the District Court into this Court.

The case was shortly spoken to by *B. R. Curtis*, for the respondents, and by *George S. Hillard*, for the petitioner. The following cases were cited. *Martin v. Martin* (1 Ves. R. 211, 213); *Drewry v. Thacker* (3 Swanst. R. 529); *Lee v. Park* (1 Keen, R. 714); *Ex Parte Foster* (5 Law Reporter, 55); *Drewry on Injunctions*, 111; *Clarke v. Lord Ormonde* (Jacob's R. 108, 124).

STORY, J. — It has been a matter of surprise to me, to see

how greatly the case of *Ex Parte Foster* (*ante*, page 132), has been misunderstood and misinterpreted. A great deal of the preliminary reasoning in that case was employed in the discussion of points, raised by the elaborate arguments of counsel, which seemed necessary to clear the way for the decision of the point, actually presented to the Court by the adjourned question. That decision was, that an attachment commenced under the Massachusetts laws by a creditor against his debtor in a suit for his debt, and which suit had not as yet arrived at the stage, in which the pleadings closed, or are even put in, is not such an absolute lien as is entitled to protection and priority under the act of Congress, but is a contingent lien dependent upon the creditor's obtaining a judgment in the suit. That if the debtor proceeding in bankruptcy should be decreed a bankrupt, and should receive a discharge under the act, that discharge could be pleaded as a good bar to the suit in the nature of a plea *puis darrien continuance*; and that consequently, under such circumstances, the District Court, acting in bankruptcy, ought not to permit the creditor, pending the proceedings in bankruptcy, and before it was possible for the debtor to obtain a discharge in a race of diligence, to obtain a judgment, which should give him a priority of satisfaction over the general creditors, out of the property attached in his suit. Consequently, the creditor ought to be enjoined against further proceedings in his suit, except so far as the District Court should allow, until it should be ascertained, whether the debtor obtained his discharge or not. If he did not obtain his discharge, then the creditor might be at liberty to proceed and get judgment, and thus to perfect his lien under his attachment, by following it up by a seizure of the property in execution, which might, under such circumstances (for the Court gave no opinion on the point), give him an unconditional priority of satisfaction out of the same. So that the effect of the injunction was not, to annul the attach-

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ment, but only to suspend proceedings in the suit, until it could be ascertained, whether the bankrupt had a good bar, or defence upon the merits, to the suit, or the creditor had an absolute right to judgment therein.

No question arose, in that case, as to what would be the effect, if the creditor had proceeded to judgment in his suit, before the petition in bankruptcy was filed by the party, praying to be declared a bankrupt (which is the very point now presented for consideration), and, therefore, the effect of a judgment was only incidentally discussed; and yet, as far as it was discussed, the Court pointed out the obvious distinction between the case of a supposed lien by an attachment of property before judgment, and the case of such a lien by attachment after judgment. In the former case, the lien was contingent and conditional, waiting upon the judgment; in the latter, it was absolute and binding at the election of the creditor as a means of satisfying the judgment.

Then came the case of *Parker and Blanchard v. Mugridge and others, in bankruptcy* (ante, page 333), where the very distinction was taken, and strongly insisted upon by the Court. That case having been founded upon contracts between the parties, as to the attachment and management of the suit, and the judgment having been in pursuance of those contracts, did not directly involve the present question, as the Court decided it upon the mere footing of those contracts. The present case is, therefore, distinguishable, it being a mere proceeding by attachment by the creditor against the debtor, *in invitum*, without the interposition of any such contracts.

I have no doubt whatsoever, that no injunction ought to be awarded by the District Court, in the case now before the Court, upon the facts stated. The proceedings in bankruptcy after the judgment can have no effect whatsoever upon that judgment, or upon the property attached in the suit. The

creditors, by their judgment, have made their right (call it if you please, their lien), perfect under the attachment. It is no longer a conditional, or contingent right, but it has attached absolutely to the property, and by the laws of Massachusetts, it remains a fixed and positive lien for thirty days after the judgment, by means of which, the creditor, at his election, may obtain a preference of satisfaction out of the property attached, over all other creditors. The Court has no authority to deprive him of that election, nor, by an injunction, to obstruct or stop his proceedings on his execution. If the bankrupt should obtain his discharge, it would be no bar or defence to the due execution and satisfaction of that judgment in the regular course of proceedings thereon; for the debtor, after the judgment, has no day in Court to plead any bar or defence. In short, after judgment, the case is precisely the same, in legal intendment, under the laws of Massachusetts, as the lien of a judgment at the common law on the real estate of the debtor. I never have doubted, that the lien of a judgment at the common law upon real estate, since the statute of Westminster, 13 Edw. I stat. 1 ch. 18, which has been adopted in many States in the Union, is within the proviso of the second section of the bankrupt act of 1841, and saved thereby, and is wholly unaffected by the proceedings in bankruptcy, when it has been obtained in the regular course, before any petition or decree or discharge in bankruptcy.

My attention has been drawn to several cases in the Courts of Equity in England, bearing upon the merits of the present case. If those cases are adverse to the doctrine, which I have already stated, it is not, that they stand upon any wrong principle; but that they were decided upon general reasoning and equitable considerations, applicable to cases of administrations in England; whereas the present question must be decided upon the true meaning of the proviso in our own statute of

In the Matter of Cook.

bankruptcy, which must of course control and govern all such general reasoning and equitable considerations.

But upon a careful examination of the authorities, there does not appear to me any ground to doubt, that the present doctrine in England is coincident with that, which this Court maintains. The case of *Martin v. Martin* (1 Ves. R. 211, 213), was one, where a creditor's bill was filed, and after the decree to account, the particular creditor was restrained from proceeding at law, and very properly restrained; for the decree was equivalent to a judgment for all the creditors, and yet could not be pleaded at law to the suit of the creditor, for Courts of law do not take cognizance of decrees in Equity. But Lord Hardwicke there said, that a decree in Equity is equal to a judgment at law, and then a preference will be given in priority of time only, as in judgments in the Courts of law. This plainly admits, that if the judgment is before the decree, it overrides the decree. And, indeed, so his lordship expressly admitted, saying, that if the creditor suing at law, obtains judgment first, he must be first satisfied, as he will then gain a preference in course of administration, both in law and Equity.¹ *Drewry v. Thacker* (3 Swanst. R. 529), does not interfere with this doctrine. There, the creditor, before the decree for an administration of the assets, had obtained a judgment at law against the administrator *de bonis intestatoris, et si non, de bonis propriis*; and the question was, whether the Court would, by injunction, stop the creditor from proceeding to execute his judgment in both respects, *de bonis intestatoris*, and *de bonis propriis*. The vice chancellor (Sir John Leach), granted the injunction; but Lord Eldon refused upon appeal to confirm it. But the point was not absolutely decided.

¹ See the general doctrine stated in *Morrice v. The Bank of England* (Cas. Temp. Talbot, 217; S. C. 3 Swanst. 573).

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There is a dictum of Lord Eldon in *Clarke v. The Earl of Ormonde* (Jacob's Rep. 108, 124), where he said ; " Even if a creditor has got a judgment before the decree, though he may come in and prove as such, he must not take out execution." Possibly this may be true *sub modo* in some cases, and under some circumstances ; but as Lord Langdale justly observed in *Lee v. Parke* (1 Kean's R. 724), this is not the ordinary rule. And in the case before him, turning upon very special circumstances, he decreed an injunction. In *Price v. Evans* (4 Sim. R. 514), the judgment was before the decree ; and in *Kent v. Pickering* (5 Sim. R. 569), although it does not appear, whether the judgment or decree was first, the Court granted an injunction only to restrain the creditor from proceeding at law against the assets ; but not from proceeding against the executor *de bonis propriis*. I should rather gather from the report, that the decree was first ; and so it seems to have been understood by a learned author on injunctions.¹

Upon the whole, my opinion is, that the injunction granted in this case, ought to be dissolved, and I shall direct a certificate accordingly, to the District Court.

¹ See Drewry on Injunctions, part 1, ch. 4, p. 115, 122.

CIRCUIT COURT OF THE UNITED STATES.

Spring Circuit.

MASSACHUSETTS, MAY TERM, 1843, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
Hon. PELEG SPRAGUE, District Judge.

SPRINGER v. FOSTER AND TRUSTEE.

THE Courts of the United States follow the decisions of the State tribunals in all questions dependent upon the local statute laws of the States.

No State insolvent laws can discharge the obligations of any other contracts made in the State, than those, which are made between the citizens of that State.

Where certain bills of exchange were drawn in Pennsylvania on a citizen of Massachusetts, and were accepted by him in Massachusetts; *It was held*, that it was not competent for the Legislature of Massachusetts, by the Insolvent Act of 1838, to discharge the obligation of these contracts.

Held, also, that attachments made on these Bills of Exchange, by process issued from the Courts of the United States, were not dissolved in consequence of the defendant taking advantage of the insolvent law of Massachusetts, although such attachments on process from the State Courts would be dissolved.

Under the circumstances of this case, the trustee was allowed only the costs and expenses incurred by him before the attachment, and the usual sum allowed for his costs, as trustee in this suit.

THE only questions in this case arose on the answers of the trustee, Charles Carter. In his first answer, at the October term, 1840, he in substance stated, that on or about the ninth

day of November, in the year of our Lord, eighteen hundred and thirty-nine, the said Foster did execute and deliver to the said Carter, a deed of assignment of all and singular the property then owned by the said Foster, for the equal benefit of all the creditors of the said Foster, who should become parties thereto, agreeably to the statute of Massachusetts, passed on the fifteenth day of April, in the year eighteen hundred and thirty-six ; and which said deed of assignment was duly executed by the said Foster and the respondent, and all the requisites of the said statute fully and completely complied with. That he held possession of the said property, till a large portion and all of the said property liable to attachment, was attached, and possession thereof taken by Daniel J. Co-burn, a deputy of the sheriff of the county of Middlesex, in the said commonwealth of Massachusetts, upon a writ issued by the Court of Common Pleas of the said commonwealth, against the said Foster, and in which the respondent was summoned as the trustee of the said Foster, and which suit was still pending ; but the respondent was informed, and believed, that the plaintiff therein has discontinued against him as trustee ; and the said property was afterwards attached by the marshal of the United States for the District of Massachusetts, upon four several writs, all in favor of the present plaintiff, and against the said Foster, the first three of which writs were returnable to the May term of this Court, then next after their issuing, to be held, and the last of which writs was that in the present suit. That all, or a major part of the said writs, had been entered in the proper Courts, and were then pending, or judgment had been rendered thereon against the said Foster. That in all the said suits, the respondent had been summoned as the trustee of the said Foster, but that in one of the said actions, he had been informed, and believed, that the said plaintiff had discontinued against him as such trustee ; that he had commenced suits for the recovery of the said property,

against Benjamin F. Varnum, the sheriff of Middlesex, and the United States marshal as aforesaid, which suits were then pending before the Supreme Judicial Court of this commonwealth; that previous to the service of the plaintiff's writ upon him, he had collected of the debts assigned to him by said Foster, by the said deed of assignment, about the sum of eleven hundred and twenty-seven dollars, which, subject to all costs and charges, was then in his hands for the purposes and trusts in the said deed of assignment mentioned and set forth, and which he claimed to hold in virtue of the said deed of assignment, for the said purposes and trusts. That since the making of the said deed of assignment to him by the said Foster, and since the issuing of the said Lowell's and the plaintiff's writs and the attachment of the said property as aforesaid, to wit, on or about the seventeenth day of August, now last past, the said Foster took the benefit of the insolvent law of this commonwealth, passed on the twenty-third day of April, in the year eighteen hundred and thirty-eight, and entitled "An Act for the relief of Insolvent Debtors, and for the more equal distribution of their effects," and that the respondent was thereafter duly chosen and appointed the assignee of the said Foster, under the provisions of the said statute, and accepted the said appointment, and received from the master in chancery, to whom said Foster applied for the benefits of the said statute, a deed of assignment, and the requisite conveyances of all the property of the said Foster, whereby all the said property, under the said statute, became vested in him, the said Carter.

In the second answer of the trustee, at the present term, he further stated certain facts, which sufficiently appear in the opinion of the Court.

Benjamin R. Curtis for the plaintiff; *Henry H. Fuller* for the trustee.

STORY, J. — When this case was formerly before this Court, the question was mooted, whether the Act of Massachusetts, of the 15th of April, 1836, ch. 238, providing for the validity of general assignments, like that, under which an assignment was made to Carter, as stated in his answer, was repealed by the subsequent insolvent act of the 23d day of April, 1838, ch. 163, the benefit of which had been sought by the defendant, Foster. The same question was then pending in the State Court; and, as it was a question of local law, dependent upon the construction of a State statute, the case was ordered to lie over to await the final decision of the State Court. That decision has now been made, and the act of 1836 has been declared to be repealed by the insolvent act of 1838. The whole protection, therefore, asserted by the trustee under the act of 1836, is gone, and the general assignment, made to him by Foster, is a mere nullity. So far, then, as the trustee's rights are concerned, and stated in his first answer, that assignment may now be laid entirely out of the case.

But upon the second answer, divers other questions have been made, which it is the duty of the Court now to consider. And, in the first place, it is said, that the plaintiff's attachment is gone by reason of the proceedings of Foster under the insolvent act, stated in the first answer, which has discharged the obligation of the contracts or drafts, or bills of exchange, upon which the present suit has been brought. These drafts or bills were drawn in Philadelphia, and by the plaintiff, who is a citizen of Pennsylvania, on Foster, who is a citizen of Massachusetts, and were accepted by him at Charlestown in Massachusetts, and of course, they are contracts made in, and governed by the law of Massachusetts. This is true in one sense; but it by no means follows, that it was competent for the legislature of Massachusetts, under the insolvent act of 1838, to discharge the obligation of these contracts.

On the contrary, the settled doctrine of the Supreme Court of the United States is, that no State insolvent laws can discharge the obligations of any contract made in the State, except such contracts as are made between citizens of that State. This was the decision in the case of *Ogden v. Saunders* (12 Wheat. R. 213), which was subsequently affirmed in *Boyle v. Zacharie* (6 Peters's R. 348). These decisions have been repeatedly acted upon in this commonwealth. *Braynard v. Marshall* (8 Pick. R. 194); *Betts v. Bagley* (2 Pick. R. 578); and *Agnew v. Platt* (15 Pick. R. 417). This objection, then, cannot prevail. Indeed, it does not appear by the trustee's answer, that Foster did ever obtain his discharge under the insolvent act. Then, is the attachment dissolved by the insolvent act of 1838? It may be admitted, that if this had been an attachment by process issued from the State Court, it could have been dissolved by the fifth section of the insolvent act of 1838. But the question is a very different one in the case of process, which issued from a Court of the United States. By the acts of Congress, the State process, existing at the time when those acts were passed, was adopted, with all the rights and incidents then attaching thereto. But no subsequent repeal or change of such process by the State legislature, is, or can *proprio vigore* be of any validity or effect in the Courts of the United States. On the contrary, the process and the incidents thereto, and the rights growing out of the same, remain the same in the Courts of the United States, as they were at the beginning, notwithstanding any subsequent State legislature, unless, indeed, under the authority of some act of Congress, the Courts of the United States have adopted such State legislation, or it has been directly adopted by an act of Congress. This was fully settled in the cases of *Wayman v. Southard* (10 Wheat. 1); *United States Bank v. Halstead* (10 Wheat. R. 51); *Beers v. Houghton* (9 Peters's R. 332); and *United States v. Knight* (14

Peters's R. 301). So that there is no ground to assert, that the insolvent act of 1838 has dissolved the present attachment, since that act has never been adopted by Congress, nor received any sanction from this Court, even if it had authority to adopt it, which I am far from supposing.

The case, then, is reduced to the simple consideration of the allowances to be made to the trustee. The first allowance claimed is for costs and expenses, incurred by the trustee in certain suits, which he commenced in the State Courts, under the local attachments in those suits, which had been assigned to him by Foster, upon the general assignment. He failed in those suits, for the very reason, that the assignment was adjudged to be a nullity. And certainly, there is no ground to assert, that against the plaintiff he has any claim to be remunerated out of the property, attached by him in the present suit, to reimburse himself for expenses, which, so far as the plaintiff is concerned, were tortious and injurious to him. It has been said, that the assignment, although void as to debts due to other creditors, was good at the common law, as to other debts due to the trustee. But this was not made a ground of defence in the State Court; and this Court has no right to overhaul or reëxamine the judgment rendered in those suits by the State Court. It must here be treated as valid and conclusive against all right in the trustee to maintain it.

No objection is made by the defendant to the allowance of the costs and expenses incurred by the trustee under, or in virtue of the general assignment, before the plaintiff's attachment. It does not appear to me, that he has a right to any costs or expenses, subsequently incurred under or in virtue thereof. They were not authorised by the plaintiff; and it does not follow, that they were for his benefit. But if they were, I am not aware, that after notice of the attachment, the

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trustee had any right to incur any costs or expenses on account of the plaintiff.

As to the supposed debt, due to the plaintiff on a note, stated in the answer, it is admitted in the evidence, that it is a mere indemnity or security for an outstanding claim against him, which may have been paid. And it is now admitted at the bar, that this claim has been paid; and therefore the note has ceased to have any farther validity. In point of law the debt is extinguished. Carter must therefore be adjudged as trustee for the full sum collected by him and in his hands at the time of the plaintiff's attachment, viz.: for the sum of \$1127, deducting only the costs and expenses incurred by him in the collection before said attachment, and such a sum, as he is entitled to be allowed in the present suit for his costs as trustee.

UNITED STATES v. FRANCIS BASSETT

STATUTES are to be interpreted so as to give effect to all the words therein, if such an interpretation be reasonable, and be neither repugnant to the provisions nor inconsistent with the objects of the statute; but the rule is otherwise, if such an interpretation require the introduction of new provisions and clauses to render it sensible or practicable.

By the Act of Congress of the 18th of May, 1842, ch. 29, where the offices of clerk of the District Court and of the Circuit Court are held by the same person, he is entitled to a compensation not exceeding thirty-five hundred dollars as district clerk, and also to a compensation not exceeding twenty-five hundred dollars as circuit clerk, per annum.

But the fees of the two offices are to be kept distinct, and if the fees of either do not amount to the maximum fixed by the Act, the deficiency should be placed to the account of the clerk, and cannot be made up from any excess in the fees of the other Court.

Thus, where the two offices are held by one person, and his fees as district clerk amount to more than thirty-five hundred dollars, and his fees as circuit clerk to less than twenty-five hundred dollars, he is entitled to the first mentioned sum as district clerk, and to the actual fees as circuit clerk, and no more.

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THIS was an amicable suit, brought by the United States, to recover a balance, supposed to be due to the plaintiffs from the defendant, as clerk of the District and Circuit Courts of the United States for the Massachusetts District, upon his return, made to the secretary of the treasury, on January 1st, 1843, pursuant to the act of Congress, passed May, 1842, making appropriations for the civil and diplomatic expenditures of government for the year 1842.

The return of the defendant to the treasury department was as follows :

Account of Fees received and of amounts paid for Clerk hire by the Clerk of the District and Circuit Courts of the United States, Massachusetts District, from July 1st, 1842, to January 1st, 1843.

DISTRICT COURT—JUNE TERM, 1842.

Per diem 18 days,	90.00	
49 Admiralty Cases,	218.00	
13 Common Law Cases,	24.50	
3 Criminal Examinations,	20.00	
Copy Rights,	97.50	
Miscellaneous Matters,	13.00	
		<hr/> \$463.00

SEPTEMBER TERM, 1842.

Per diem 20 days,	100.00	
52 Admiralty Cases,	217.00	
11 Common Law Cases,	48.00	
Copy Rights,	99.50	
Miscellaneous Matters,	16.00	
		<hr/> 480.50

DECEMBER TERM, 1841.

Per diem 15 days,	75.00	
39 Admiralty Cases,	159.00	
11 Common Law Cases,	31.00	
5 Criminal Cases,	60.00	
Copy Rights,	60.00	
Miscellaneous,	35.00	
		<hr/> 420.00

United States v. Bassett.

CIRCUIT COURT—MAY TERM, 1842.

Per diem 7 days,	35.00	
5 Cases in Equity,	73.00	
5 Cases at Common Law,	24.90	
Miscellaneous,	25.00	
		<u>157.90</u>

OCTOBER TERM, 1842.

Per Diem,	110.00	
29 Cases in Equity,	102.54	
40 Cases at Common Law,	96.00	
10 Criminal Cases,	120.00	
Miscellaneous,	73.00	
		<u>501.54</u>
Fees received in Bankrupt Cases,		7118.00
		<u>\$9140.94</u>

Amount paid for Clerk hire as by Schedule

marked A, annexed,	2985.08	
Maximum compensation to Clerk,	3000.00	
		<u>5985.08</u>
Balance on hand,		<u>\$3155.86</u>

SCHEDULE A.

Amounts paid for Clerk hire from July 1st, 1842, to January 1st, 1843.

Paid to James B. Robb,	750.00
Paid to Elisha Bassett,	500.00
Paid to H. A. Frost,	300.00
Paid to F. Warren,	300.00
Paid to Henry F. Starkey,	300.00
Paid to T. M. H. Lyon,	290.70
Paid to James Amos,	277.93
Paid to James Boyle,	266.45
	<u>\$2985.08</u>

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Upon this return the first auditor of the treasury reported as follows :

TREASURY DEPARTMENT, }
First Auditor's Office, 2d June, 1843. }

I have examined and adjusted an account of official receipts and expenditures of Francis Bassett, Clerk of the District and Circuit Courts of the United States for the District of Massachusetts, commencing July 1st, and ending December 31st, 1842, under the civil and diplomatic appropriations act of 18th May, 1842, and find that he is charged as follows :—

To amount of Fees received by him during said period,	9,140.94
	\$9,140.94

I also find that he is entitled to the following credits, viz. :

By amount of compensation to his Deputies, . . .	2,985.08
By maximum compensations for the half year, . .	1,750.00
And that the balance due to the United States on the 1st day of January, 1843, amounted to, . . .	4,405.86
	\$9,140.94

I have also examined and adjusted an account of the said Francis Bassett, and find that he is chargeable as follows :

To balance of his account ending 31st December, 1842,	4,405.86
	\$4,405.86

I also find him entitled to credit —

By amount of warrant No. 1811 in favor of the Treasurer, dated June 1st, 1843,	3,155.86
And that the balance due to the United States amounts to	1,250.00
	\$4,405.86

It was agreed by the parties that a default or nonsuit should be entered, upon the construction of the act relating to the fees and emoluments of the clerks of the Courts of the United States.

Dexter, District Attorney of the United States, for the plaintiffs.

It is a sound and useful rule of construction, that an instrument or statute shall be so interpreted, if possible, that effect may be given to all its parts. It is plain, that upon the construction contended for by the defendant, the words "or in case both of the said clerkships shall be held by the same person, of the said offices," are entirely superfluous and ineffectual; for without them, it is clear that the incumbent of both offices would be entitled to the salary of both, they being made distinct offices by the act of 28th February, 1839, which authorized the Circuit Courts to appoint their own clerks, until which time the District Court clerk was, by virtue of the judiciary act of 1789, clerk also of the Circuit Court. It is then to be inquired, for what purpose were the words inserted in the act of 1842, which are quoted above. And it is difficult to conjecture any purpose except that of diminishing the fees of the offices when so held together. *Extra-judicially*, it could hardly be doubted, that the intention of the framer or amender of the act was to say, that when both offices were held by the same person, the incumbent should be paid only for one. But we are not allowed to conjecture the meaning of the legislature; we must find it in their language. Yet we must be careful not to be found *hærentes in cortice* by a too rigid construction of that language. Being satisfied, that something was intended, we are bound to find it if we can; and the obscurity or deficiency of the language is much relieved, when there seems but one purpose, that could have existed in the mind of the legislature, although the purpose be very feebly expressed. Transposition of words frequently assists us in such a case. Now, suppose these perplexing words, instead of having been obviously interpolated into the middle of a sentence by some reformer of supposed abuses, had been removed to the end of it, and inserted by way of proviso, thus — "Provided, however, that in case both of the said clerkships shall be held by the same person, he shall not

be allowed to retain of the fees and emoluments of the said offices, for his own personal compensation, a sum exceeding three thousand five hundred dollars per year, for any such District clerk, *or a sum exceeding two thousand five hundred dollars per year for any such Circuit clerk.*" In such case it would be plain, that the last clause (italicised) would be superfluous, yet, being in the disjunctive with the preceding clause, by the word "*or*," only one of the two salaries could be claimed; and where either of two may be claimed, of course the larger is due. Now the words are not altered by the above transposition, and it is not perceived that the sense is varied by the change of collocation.

It will be remarked, that the salaries are provided not for such District *clerkship* and Circuit *clerkship*, but for such District and such Circuit *clerks*. If the legislature had intended that the incumbent of both offices should have both salaries, why did they not use the word "*clerkship*," in which case the meaning would have been clear? And, on the other hand, by the use of the words "such District clerk" and "such Circuit clerk," taken in connection with the preceding clause, respecting both "*clerkships*" being held by the same person, was it not intended to designate a person? And if it be the same person that holds both offices, does it not compel him to elect to take the \$3,500 as "such District clerk," "*or*," the \$2,500 as "such Circuit clerk?"

But it is significantly asked, "If the clerk is entitled to but one of these salaries, which shall he take? Why should he have the \$3,500 rather than the \$2,500 only?" And the question certainly exhibits very strongly the unskilfulness of the draftsman of the act. But I have already anticipated the answer—that having a right of election in such case, he would be entitled to the larger amount. But another answer has been suggested, namely: that he would take the larger salary as that of the "*District clerk*," because the person

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holding both offices is emphatically the "District clerk," being the only clerk of the District; whereas when the offices are separate, there is a clerk of the Circuit Court for the District, and a clerk of the District Court, but no one is the clerk of the District. It will be observed, that in the act these officers are first named as clerks of the respective Courts, but are last named as the District clerk and the Circuit clerk.

It is not pretended that this reasoning can be entirely satisfactory. It cannot be denied that it is highly verbal and perhaps hypercritical; but it is presented as the answer to verbal difficulties suggested by the defendant. It proceeds upon the supposition that Congress meant something by these words, and that the only meaning they could have, is to restrict the salary of an incumbent of both offices. And, from the whole tenor of this section, it appears that retrenchment and restriction and security from large compensations to officers were its objects. But if the Court should think otherwise, yet, upon the point of the amount to be retained by the defendant, as clerk of the Circuit Court, it is apparent, from the statement of the case, that he cannot charge his maximum of \$1250, because so much has not been received by him as clerk of the Circuit Court, during the six months; to make it up he must take about \$590 from the fees in bankruptcy accruing in the District Court, as only about \$30 of bankrupt fees accrued in the Circuit Court, and all other fees there were but \$659.44. The deficiency will perhaps be made up to the defendant in the accounts of the next six months.

Bassett, pro se, answered as follows:

The offices of District clerk and Circuit clerk are distinct, the power of appointment to each being given by law to the respective Courts, and a maximum compensation is affixed to

each. Although both clerkships may be held by the same person, and this seems to have been contemplated by the act of 1842, it is provided, when this is the case, that the fees and emoluments of the said *offices* shall, up to the maximum of each, be paid to such District clerk, and such Circuit clerk. This, it is believed, is the fair and only true interpretation of the act. Any other construction given to it would be arbitrary, for the person holding both offices might, with as much propriety, be limited to the maximum compensation of Circuit clerk, as to that of the District clerk. But there is no limitation to either, by express words, or by construction in the act. The language is "out of the fees and emoluments of the said offices, a sum not exceeding \$3,500 to such District clerk, or a sum not exceeding \$2,500 to such Circuit clerk." Now if any limitation or restriction to one of the maximums had been intended, the language would have been, "and when the said clerkships shall be held by the same person, no such District and Circuit clerk shall receive a sum exceeding \$3,500." But it is said by the District Attorney, that a statute should be so interpreted, if possible, that effect may be given to all its parts, and that the words, "or in case both the said clerkships shall be held by the same person," are entirely superfluous and ineffectual, for without them it is clear, that the incumbent of both offices would be entitled to the salary of both; and, therefore, the words must be construed to diminish the fees of the offices when so held by the same person. Can such an inference be drawn from any rule of construction? On the contrary, if the incumbent is entitled to both salaries, is it not because he holds both offices? And, if so, is it less clear and certain, that he is entitled to both salaries, when the reason or foundation of his claim (namely, that he holds both offices), is stated in express words. Moreover, as the offices may be held by different persons, without the words, "when both clerkships shall be held by the same person, the said

offices," &c. the intent of the act, that both salaries should be received by the same person, would not be so clear and certain; for it might be argued, that the provision for the Circuit clerk was intended for that office alone, and not when both clerkships were held by the same person. The words, therefore, have a meaning and are not superfluous. In answer to the suggestion, that Congress intended to diminish the fees of the offices, it is sufficient to reply, that such an intent is not expressed. The intent of Congress, perhaps, can best be inferred from the cause which produced the act. By the act of May, 1841, the fees and emoluments of clerks of Courts were limited to \$4,500, and afterwards the bankrupt law was passed, which greatly increased the business and emoluments of the office. By the appropriation act of 1842, the clerks are required to include, in their semi-annual returns, all fees arising under the bankrupt act. This clause relating to fees in cases of bankruptcy, is not in the act of 1841, because when that act was passed, the bankrupt law did not exist. Now, it can hardly be supposed, that it was the intent of Congress to lessen the maximum of clerk fees, when the business and emoluments of the office and the labor and responsibility had been quadrupled by cases in bankruptcy. If, therefore, by any rule of construction, it were allowable to infer the meaning and intent of an act from the circumstances under which it was passed, the construction of the act of 1842, contended for by the defendant, is in accordance with the spirit as well as the letter of the act. The act of 1842 does not specify to which clerkship, the fees and emoluments received or payable under the bankrupt act, shall belong, when both clerkships are held by the same person; but the language is "out of the fees and emoluments of the said offices, such District clerk shall receive a sum not exceeding \$3,500, and such Circuit clerk a sum not exceeding \$2,500; and as the maximum compensation was undoubtedly fixed

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with reference to the fees in bankruptcy, and the fees and emoluments arising under the bankrupt act, are by the words of the act of 1842, to be distinguished from any other service, it would seem to follow that the clerk is entitled to receive out of the fees and emoluments of the said offices the maximum compensation of six thousand dollars.

STORY, J. — This is an amicable action and turns altogether as to its merits upon the construction of a clause (No. 167), in the General Appropriation Act of the 18th of May, 1842, chap. 29. That clause, after appropriating the sum of \$375,000 for defraying the expenses of the Courts of the United States for the year 1842, &c. proceeds as follows: "Provided, however, that every District Attorney, clerk of a District Court, clerk of a Circuit Court, and marshal of the United States, shall, until otherwise directed by law, upon the first days of January and July in each year, commencing with the first day of July next, or within thirty days from and after the days specified, make to the secretary of the treasury, in such form as he shall prescribe, a return in writing, embracing all the fees and emoluments of their respective offices, of every name and character, distinguishing the fees and emoluments received or payable under the bankrupt act, from those received or payable for any other service; and in the case of a marshal, further distinguishing the fees and emoluments received or payable for services by himself personally rendered, from those received or payable for services rendered by a deputy; and also distinguishing the fees and emoluments so received or payable for services rendered by each deputy, by name, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive; and also, embracing all the necessary office expenses of such officer, together with the vouchers for the payment of the same, for the half year ending on the said first day of January or

July, as the case may be ; which return shall be, in all cases, verified by the oath of the officer making the same. And no District Attorney shall be allowed by the said secretary of the treasury, to retain of the fees and emoluments of his said office, for his own personal compensation, over and above his necessary office expenses, the necessary clerk hire included, to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding six thousand dollars per year, and at and after that rate, for such time as he shall hold the office ; and no clerk of a District Court, or clerk of a Circuit Court, shall be allowed by the said secretary, to retain of the fees or emoluments of his said office, or, in case both of the said clerkships shall be held by the same person, of the said offices, for his own personal compensation, over and above the necessary expenses of his office, and necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding three thousand five hundred dollars per year, for any such District clerk, or a sum exceeding twenty-five hundred dollars per year for any such Circuit clerk, or at and after that rate, for such time as he shall hold the office ; and no marshal shall be allowed by the said secretary, to retain of the fees and emoluments of his said office, for his own personal compensation, over and above a proper allowance to his deputies, which shall in no case exceed three fourths of the fees and emoluments received as payable for the services rendered by the deputy to whom the allowance is made, and may be reduced below that rate by the said secretary of the treasury, whenever the return shall show that rate of allowance to be unreasonable, and over and above the necessary office expenses of the said marshal, the necessary clerk hire included, also to be audited and allowed by the proper accounting officers of the treasury, a sum exceeding six thousand dollars per year, or at and after that rate, for such time as he shall hold the office ; and every

such officer, shall, with each such return made by him, pay into the treasury of the United States, or deposit to the credit of the treasurer thereof, as he may be directed by the secretary of the treasury, any surplus of the fees and emoluments of his office, which his half-yearly return so made as aforesaid shall show to exist over and above the compensation and allowances hereinbefore authorized to be retained and paid by him."

Mr. Bassett is, and for many years has been, the clerk of the District Court of Massachusetts, and until the year 1839, was under the judiciary act of 1789, chap. 20, sec. 7, *virtute officii*, also clerk of the Circuit Court of that District. This regulation was applicable to all the Circuit Courts, excepting that held in the District of North Carolina, under the act of 29th of April, 1802, chap. 31, sec. 8, where the Circuit Court had authority to appoint its own clerk, and excepting also the Circuit Courts of the seventh Circuit, created by the act of the 24th of February, 1807, chap. 71, [61], sec. 3, which had also authority to appoint their own clerks. It was, in part, to cure this anomaly, and to introduce a uniformity of regulation, as to the appointment of clerks of the Circuit Courts, as well as to prevent some practical inconveniences in the appointments, which had arisen in some of the Circuits, that the act of the 28th of February, 1839, chap. 36, was passed, which (sec. 3), gave to all the Circuit Courts of the United States the appointment of their own clerks, and in case of a disagreement between the Judges, gave the appointment to the presiding Judge of the Court. Under this act, Mr. Bassett was appointed clerk of the Circuit Court; and now holds the offices of clerk of the District Court, and also of clerk of the Circuit Court of Massachusetts.

Under these circumstances, the question arises, whether Mr. Bassett is entitled, upon the true interpretation of the clause, above stated, of the act of 1842, chap. 29, to the com-

pensation not exceeding \$3,500, as District clerk, and also to the compensation not exceeding \$2,500 as Circuit clerk, per annum, or to one only of these compensations; and if to one only, to which. The language of the clause, bearing upon this point is, that "No clerk of a District Court, or clerk of a Circuit Court, shall be allowed by the secretary to retain of the fees and emoluments of his said office, or *in case both of the said clerkships shall be held by the same person, of the said offices*, for his own personal compensation, over and above the necessary expenses of his office, and necessary clerk hire included, &c. a sum exceeding \$3,500 per year, for any such District clerk, or a sum exceeding \$2,500 per year, for any such Circuit clerk, or at and after that rate, for such time as he shall hold the office." It is plain from this language, that where the offices of District clerk and Circuit clerk are held by different persons, each of them respectively is entitled to the prescribed compensation affixed to the office held by him. In such a case, it is equally plain, that the compensation is allowed for the duties and services performed in his office, and not as a mere gratuity. If this be the true interpretation of the clause in such a case, what ground is there to suppose, that the like interpretation should not prevail, where both offices are held by one and the same person? The duties and services, to be performed in each office, are and must be the same, whether they are held by the same person, or by different persons. It would be to impute a most extraordinary intention to the legislature to presume, that it intended to apportion the compensation in the inverse ratio of the duties and services performed; or that it meant, if both offices were held by the same person, that the whole duties and services, performed in one, should be gratuitously performed, without any compensation whatsoever, although the compensation allowed for the duties and services, performed in the other, is strictly founded upon a *quantum meruit*, and merely a requital

therefor. Such a mode of legislation, so little supported by principles of justice or Equity, ought certainly not to be adopted, unless the legislature has spoken in the most clear and unambiguous terms. If there be any ground for real substantial doubt, as to the correctness of such an interpretation, that alone would seem to repel it; for it is not in matters of doubt to be admitted, that the legislature requires duties and services from a public officer, and yet intends to take from him the compensation, which it has itself deemed a fit compensation therefor, under ordinary circumstances. Besides; The act itself is restrictive of the right of the officers to all the fees and emoluments of their office, generally allowed by law, cutting down and limiting the compensation to a fixed maximum, and appropriating the residue to the public treasury. Now, in such cases, the general rule of interpretation is to give effect to the restriction and limitation, only so far as the legislature has clearly and positively spoken, since it is in derogation of private rights otherwise vested in the incumbent in office. We cannot, and we ought not in such a case, to say, *Voluit, sed non dixit*; for the intention can be fitly gathered only from the words; and therefore it is but just to say, *Non voluit, quia non dixit*.

But it is said, that it is the duty of the Court to give effect to all the words used by the legislature, if it can be reasonably done; and that in the present case, unless the construction contended for by the government prevails, no effect whatsoever is, or can be given to the words, "or, in case both of the said clerkships shall be held by the same person of the said offices"; for the interpretation of the other language would be the same, if they were struck out of the act. Certainly, we are to give effect to all the words of a statute, if by a reasonable interpretation that can fairly be done, and it involves no repugnancy to other provisions, and is not inconsistent with the apparent objects of the statute. But, then, the

qualifications of the rule are most material to be observed. The interpretation must in itself be reasonable. It must not be such as apparently was not, or could not be, within the legislative intendment. It must be such, as will promote, and not such, as will defeat or interfere with the policy, upon which the statute purports to be founded. *A fortiori*, such an interpretation is not to be adopted to give effect to particular words, which will require, on the part of the Court, the introduction of new provisions and auxiliary clauses, which the statute neither points out, nor even hints at, and yet which are indispensable to make such interpretation sensible or practicable. Take, for example, the very case before the Court. Suppose the construction of the act, contended for on the part of the government, were adopted by the Court; what compensation is Mr. Bassett to receive? That of district clerk, or that of circuit clerk? The statute has not spoken upon that point; and that very circumstance strongly shows, that the case could not have been within the contemplation of the legislature. But it is said, that Mr. Bassett has the right of election, and may say, whether he will receive the less or the larger compensation. Where does he get his right of election? It is not conferred upon him by the act. It is not even alluded to. If he should insist upon receiving the larger compensation, what is there to prevent the government from insisting, that he is entitled only to the smaller compensation? The right of election is just as much given by the statute to the government, as to Mr. Bassett. In the struggle for it, there is quite as much ground to assert the right of the government to exercise the privilege of an election as for Mr. Bassett to assert the like privilege. Each has an equal interest in the choice. In truth, the statute confers it on neither. It is silent as to the possible existence of any case for an election, and that silence is of itself very expressive that no such case was contemplated. It would scarcely

be credible, that the legislature should contemplate a case, where both offices were held by the same person, and intend only a single compensation for the duties attached to both, and yet should not have said, what that compensation should be, or have provided for an election. Now, I confess myself not bold enough to insert in this statute, a clause giving the right of election either to the clerk or to the government. I find no warranty for it in the words or the objects of the statute; and to place it there, would, in my judgment, be to make a new enactment, and not to construe the existing language of the act.

But, then, as to the point of the objection, that otherwise the words above recited have no distinct and emphatic effect, and that the act will read just the same without them; what is the amount of the objection? It is nothing more than that the legislature has used superfluous language; that it has used words which might have been spared, and are either unnecessary or tautological. Now, I believe, that there are very few acts of legislation in the statute book, either of the state or of the national government, or of the British parliament, which do not fall within the same predicament, and are not open to the same objection, or, if you please, to the same reproach. The truth is, that it arises sometimes from loose and inaccurate habits of composition of the draftsman, sometimes from hasty and unrevised legislation, but more frequently from abundant, and, perhaps, over-anxious caution. Even our constitutions of government, if nicely scrutinized, cannot escape this reproach, if reproach it can properly deserve to be called. Mr. Madison has somewhere remarked, that the constitution of the United States contains numerous tautological expressions, which convey no additional or distinct meaning from the context. The very first power given to the Congress of the United States by the constitution, the power "to lay and collect taxes, duties, imposts and excises," is open to this very

suggestion. Are not duties, imposts and excises, in reality taxes? Are not these words sometimes used to express the same thing? Imposts are but external taxes or duties; excises are but internal taxes and duties. No one, however, can reasonably doubt, but these words were all used in the constitution from abundant caution, to avoid a doubt or to prevent a cavil, as each of these words is sometimes used in a broad and general sense, and sometimes in a more narrow and restricted sense. The objection, therefore, is not of itself a just ground to alter the interpretation of any clause of an act, otherwise sensible and satisfactory, in order to escape the imputation of being unnecessary. Assuming it to be unnecessary, it by no means follows, that it is, therefore, to have some new meaning given to it, or that it may not justly be presumed to be used *ex majori cautela*.

In the present case, I have no doubt, that the clause was introduced into the act, *ex majori cautela*. The legislature knew, that in some of the Circuits the District clerk was not the Circuit clerk, and that in all the Circuit Courts it was competent for the Court to make a separate and distinct appointment. It meant to provide, therefore, for both classes of cases; and to apply the same rule of compensation, whether both offices were held by the same person, or not. It might have been a matter of some doubt (I do not say of well-founded doubt), whether the limitation of the compensation applied to any cases, except where both offices were held by different persons. It was, therefore, a matter very fit to be provided for by express legislation; and the very words are inserted, which should be, to meet such a case.

But, in my judgment, there was a far better and more important reason for the insertion of the words. It might have been a matter of some doubt, if the words had not been inserted, whether a clerk, holding both offices, was entitled to the maximum compensation provided for each; or whether it

was a *casus omissus* in the act, and open, therefore, to opposite constructions. For this purpose, the legislature studiously inserted the words, and by them established, that the same rule should apply to all cases, whether both offices were held by the same person, or each by a different person. And it appears to me, with great deference and respect for those, who entertain a different opinion, that this is the plain and rational, and natural, I had almost said, the necessary construction of the words of the clause. If we read the words in their proper order and connexion, *reddendo singula singulis*, it will be found, that there is no difficulty in ascertaining this to be the true meaning. "No clerk of a District Court, or clerk of a Circuit Court, in case both of said clerkships shall be held by the same person, shall be allowed by the secretary to retain of the fees and emoluments of the said offices, for his own personal compensation, a sum exceeding \$3500 per year, for any such District clerk, or a sum exceeding \$2500 per year, for any such Circuit clerk." Now, here, I have added nothing to the words of the clause, and omitted nothing, applicable to the case put, but I have read the words, as they must be read, to give them any sense; and yet, unless I labor under a grievous mistake, the words admit of no other construction or interpretation, than that the clerk shall receive the distinct compensation provided for the clerk of each Court, that is, that he shall receive not exceeding \$6000 in all, and not exceeding in any case, the prescribed compensation given to the clerk of each Court. If the legislature had intended to restrict the compensation to that given to one of the clerkships, in case both were held by the same person, the natural language would have been, where both of the offices were held by the same person, that he should receive of the fees and emoluments of the said offices, a sum not exceeding \$3500 (or some other fixed sum), for both. The actual language used, is far different. It contains no alternatives of compen-

sation, and no restriction to the fees and emoluments of one office, excluding any for the other.

There is another question, which is incidentally brought to the notice of the Court, and results from the semi-annual return of the clerk in the case. The clerk therein claims the sum of \$3000 as his semi-annual compensation, as clerk of both Courts, not distinguishing between the fees belonging to him, as clerk of the District Court, and those belonging to him, as clerk of the Circuit Court, and placing all the fees in bankruptcy in one aggregate sum, as if the cases were pending in both Courts. In this respect his return is certainly erroneous. He is entitled to all the fees and emoluments, belonging to him, as clerk of the Circuit Court, including the fees in cases of bankruptcy, adjourned into the Circuit Court, and not exceeding for the half year, the maximum of \$1250; and to the fees and emoluments belonging to him as clerk of the District Court, including the fees in the cases in bankruptcy, pending in the District Court, not exceeding for the half year the sum of \$1750. It is suggested, that the fees in cases in bankruptcy, pending in the Circuit Court, during this half year, were about thirty dollars only; the other fees and emoluments in the Circuit Court, during the same period, appear by the return to be \$669.44, only; so that they do not reach the maximum, charged in the return. This is an error; and it should be reformed, so as to make the return stand consistently with the act.

The judgment must, therefore, be entered for the United States, for the amount, which is due to the treasury, according to this opinion; and it can be readily adjusted between the parties.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MASSACHUSETTS, OCTOBER TERM, 1843, AT BOSTON.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. PELEG SPRAGUE, District Judge.

SAMUEL BEAN v. THOMAS SMALLWOOD.

A MACHINE is only patentable, when it is substantially new ; but the application of an old machine to a new purpose is not patentable.

In the present case the invention was held not to be patentable, because it was merely the application of an old apparatus to a new purpose.

CASE for infringement of a patent, dated 30th of March, 1840, for "a new and useful improvement in the rocking chair." The specification annexed to the patent stated as follows : "The principal feature of this invention and improvement consists in making the seat and stool of the chair in two parts, so that whilst the stool remains stationary, the seat is made to rock on the top of it ; thus doing away with the long and cumbersome rockers on the common chair, which occupy a great deal of room, and are very destructive to carpets, and which also renders the back of this improved chair susceptible of being fixed in a reclining position at any angle to suit the wishes of the sitter, and at the same time rendered perfectly secure from being thrown off the stool.

Bean v. Smallwood.

Plea, the general issue, with a notification of special matters of defence, (1). That the invention was not new, but is described in certain books, naming them, and invented and used before by certain persons, naming them.

B. R. Curtis, for the defendant, at the trial, cited *London Journal of Arts and Sciences* (of the conjoint series), vol. 7, 1836, p. 161, describing an easy chair patented in 1833. The chair is in two parts, on curved surfaces; he also cited *Phillips on Patents*, 102, 106.

He also read the specification of *Simmons's* patent for "an improvement in rockers for chairs, cradles, or others thing intended to be rocked," granted in 1819.

Sewall, for the plaintiff, admitted, that the two first parts in the claim in the plaintiff's specification of his invention were similar to those in *Simmons's* patent; but he insisted, that the third part in his claim in the specification was the plaintiff's invention, and under the Patent Act of 3d of March, 1837, ch. 812, § 9, he was entitled to maintain his present suit for an improvement thereof, as the patent was by the act good *pro tanto*. He added, that the third claim was new, and if not, it was an application to a new purpose.

Curtis, e contra, contended, that the section applied only to cases where the patent was broader than the invention, by mistake, accident, or inadvertence. He further insisted, that the plaintiff's patent was substantially, in all respects, like *Simmons's* patented invention, with unimportant differences of form. And he called a witness who established the facts; and his testimony was admitted by the plaintiff to be unimpeachable.

STORY, J. — It seems to me, that, upon the evidence ad-
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mitted by the parties, the plaintiff has no case. His patent is not (as the plaintiff admits), for a new combination of old materials, or for a new rocking-chair, framed in a manner unknown before. If it were, it seems admitted by the plaintiff, that, upon the evidence, it would not be maintainable. It would seem open to one of two objections; (1). That the defendant does not use precisely the same combination; but a modification thereof; that is to say, although he uses the two first specifications of the claim in the patent, he does not use the third; but an apparatus to accomplish the same purpose, of a somewhat different structure. Or, if the last apparatus be substantially like the plaintiff's, then that the same apparatus is not new, nor the combination in any part new. But he contends, and it seems to me, that it may perhaps be deemed a fair interpretation of the words, in which the claim is summed up in the specification, that it is a claim for three distinct and several things, and that if either is new, *pro tanto*, he is entitled to maintain his suit under the 9th section of the Patent Act of 1837, ch. 45. Now the summing up of his claim is as follows: "What I claim as my invention and desire to secure by letters patent consists, (1). In making the seat and stool of the chair in two parts, so that the seat shall rock on the top of the stool, instead of having the parts permanently united with rockers on the legs of the stool, as heretofore. (2). And also the mode of connecting together the seat and stool by the vertical plates attached to the seat, passing through the stool, with shoulders projecting from the sides thereof, which catch against the under side of the stool when the seat is rocked to or fro. (3). And likewise the manner of reclining the back of the seat at any angle required, by the lock plates and notches in the hanging plates, which receive them as before described."

The two first specifications of claim are admitted to be the same as in Simmons's patent, and therefore are not new or

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patentable. The third and last specification of claim, upon the testimony of Mr. Eddy, which is admitted to be true, is equally unsupportable. He says, that the same apparatus, stated in this last claim, has been long in use, and applied, if not to chairs, at least in other machines, to purposes of a similar nature. If this be so, then the invention is not new, but at most is an old invention, or apparatus, or machinery, applied to a new purpose. Now, I take it to be clear, that a machine, or apparatus, or other mechanical contrivance, in order to give the party a claim to a patent therefor, must in itself be substantially new. If it is old, and well known, and applied only to a new purpose, that does not make it patentable. A coffee mill applied for the first time to grind oats, or corn, or mustard, would not give a title to a patent for the machine. A cotton gin applied without alteration to clean hemp, would not give a title to a patent for the gin as new. A loom to weave cotton yarn would not, if unaltered, become a patentable machine as a new invention by first applying it to weave woollen yarn. A steam engine, if ordinarily applied to turn a grist mill, would not entitle a party to a patent to it, if it were first applied by him to turn the main wheel of a cotton factory. In short, the machine must be new, not merely the purpose to which it is applied. A purpose is not patentable; but the machinery only, if new, by which it is to be accomplished. In other words, the thing itself which is patented must be new, and not the mere application of it to a new purpose or object.

Under these circumstances, upon the admissions of the parties, it does not strike me that the action is maintainable.

The plaintiff submitted to a non-suit.

Winans v. Boston and Providence Rail-road Company.

ROSS WINANS

v.

BOSTON AND PROVIDENCE RAIL-ROAD COMPANY.

WHERE the plaintiff, in the specification of his patent, claimed as his invention "an improvement in the construction of the axles or bearings of railway, or other wheeled carriages," and it appeared, that the improvement, though it had never before been applied to railway carriages, was well known as applied to other carriages; *It was held*, that the patent was not good.

CASE for infringement of a patent dated the 30th of July, 1831, for "a new and useful improvement of Rail-way and other wheeled carriages." Plea, the general issue with special matters of defence, (1). That the invention was not new. (2). That the invention was in public use before the patent, with the consent of the patentee. The specification annexed to the patent was in substance as follows: "*To all whom it may concern*, be it known, that I, Ross Winans, have invented an improvement in the construction of the axles, or bearings, of Rail-way, or other wheeled carriages, and that the following is a full and exact description thereof:

"The axle, with my improved journals, or bearings, may be made straight, and the wheels placed thereon in the usual way; but instead of forming the bearing under the body of the carriage, and within the naves, or hubs, of the wheels, there to sustain the weight of the load, I extend the axles out at each end, projecting beyond the naves to such a length as shall enable me to form them into gudgeons. The lengths and diameters of these gudgeons, I regulate according to the load they are intended to sustain, and to other circumstances. In all cases, however, the value of my invention depends upon the gudgeons having their diameters as small as a due attention to the strength required will allow. The causing the

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axles to run in boxes, or upon bearings, without the naves, admits of their being made much smaller than usual, the degree of diminution which I have found to answer well in practice, will hereafter be stated. They should be formed of good wrought iron, and case-hardened: or overlaid, or cased with the best steel, and hardened, which materially diminishes the extent of bearing surface necessary to enable them to receive and resist the pressure of the load, and their tendency to wear; they may therefore be short, and are consequently strong, when of comparatively very small diameter.

“The tendency to lateral movement is checked, or limited by forming the end, or point of the axle, or gudgeon, so as to be met occasionally by the external cap or cover of the gudgeon box, when lateral pressure occurs.

“By placing the bearing outside (as aforesaid), the diameter of the wheels may be enlarged with more advantage than formerly, as the axles between the wheels may be made of any required strength (to resist the increased stress thrown on to that part of them by an enlargement of the wheels,) without affecting the size or strength, of the bearing journals.

“By the foregoing means, the leverage of the wheels (or the mechanical advantage with which the moving power acts, to overcome the resistance to motion), is increased, and consequently the friction or resistance to motion in Rail-road carriages, diminished to a greater extent than heretofore.

“This improvement in the axles and journals of Rail-way carriages, was devised and carried into operation on my experimental Rail-way, and exhibited to various persons in the early part of the year 1827; and it was put into practical operation, under my direction, on the Baltimore and Ohio, and on the Liverpool and Manchester Rail-roads, in the early part of 1829, in connection with another improvement for the further diminution of friction, by means of a revolving bearing,

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or friction wheel, for which other improvement a patent was granted to me on the 11th of October, 1828."

"The object of the invention, and a practical demonstration of its utility having been shown, its application and adaptation to the different Rail-road carriages, burthen wagons, locomotive engines, &c. and to the different bearing boxes that may be preferred for different purposes (either revolving or common), will be evident and easy, to any person acquainted with the building of Rail-way carriages. But to render it still more so, the following general directions and proportions are given," &c.

"I, therefore, declare that the improvement, or improvements, above explained and described, in diminishing the resistance to motion in wheeled carriages to be used on Railways, which I claim as my own invention, is the extending the axles each way outside of a pair, or pairs, of wheels, far enough to form external gudgeons to receive the bearing box of the load body, and diminished as aforesaid with a view to lessen the resistance of friction, as small as its situation, with the use of the most favorable metal for wear, will permit. Thus conveniently increasing the leverage of the wheels, without impairing their effective strength or durability."

At the trial it appeared, that Winans had obtained a patent for the invention in England in Oct. 1828, and afterwards on the 30th of July, 1831, he took the present patent.

It was argued by *B. R. Curtis*, for the defendants, that this was too late; and *Shaw v. Cooper* (7 Peters' R. 292, 320, 322), act of 1839, ch. 88, § 7, and *McClurg v. Kingsland* (1 How. Sup. Ct. R. 202; S. C. 17 Peters' R. 228), were cited. But the main ground was, that the invention was not new, but had been before applied to other carriages, although not to Rail-way carriages, before the patentee applied it to Rail-

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ways. The patent was not for the application of the improvement to Rail-way carriages alone, but it was "to Rail-way and other wheeled carriages." Edgeworth on Roads and Carriages, printed in 1817, appendix 2, pages 71, 73, 76; and Dr. Hook's Essay upon Carriages, printed in 1684, pages 145, 146, were cited in support of the objection.

C. G. Loring, for the plaintiff, argued, that it was the intention of the plaintiff to claim as his invention the application of extended axles of wheels to carriages with flanges on Rail-roads; that the plaintiff claimed this particular combination as new, and it was so. But he did not mean to claim the invention as applicable to all other wheel carriages.

STORY, J. — I fear that it is impossible to give this limited interpretation to the plaintiff's patent. The patent itself is for "a new and useful improvement of Rail-way, and other wheeled carriages;" and the specification expressly states, that the patentee has invented "an improvement in the construction of the axles, or bearings, of Rail-way, or *other wheeled carriages*," and then he proceeds to give a description thereof. It is plain from this language that he does not limit his invention to Rail-way carriages; but he insists, that it is new as to other carriages. It is true, that in summing up his claim, in the close of the specification, he seems to use language somewhat more restrictive; but even there he says, that what he claims as his invention is, "the extending the axles each way outside of a pair or pairs of wheels, far enough to form external gudgeons to receive the bearing box of the load body, and diminished as aforesaid with a view to lessen the resistance of friction, as small as its situation, with the use of the most favorable metal for wear, will permit; thus conveniently increasing the leverage of the wheels without impairing their effective strength or durability." Now the invention, as

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stated in this general form, is precisely what the defendants insist is not new, but was well known before, as applied, not to Rail-way, but to other carriages. If this be true, it seems difficult to perceive how the present patent can be maintained.

A verdict was thereupon taken *pro formâ* for the defendants, with liberty to move a new trial upon the question of law. No such motion was made.

THE PRESIDENT, DIRECTORS, ETC. OF THE SEVENTH WARD
BANK v. EDWARD HANRICK.

WHERE a note became due on Saturday, and was duly presented and dishonored, and the indorser lived in another State ; *It was held*, that notice of the dishonor should, in order to bind the indorser, be put into the mail of the succeeding Monday, early enough to go by the mail of that day to the place of residence of the indorser, it appearing that the mail on that day did not close until half-past three o'clock, P. M. ; otherwise the indorser would be discharged.

If, after a note is dishonored, and notice is given to the payee, who is the first indorser, an arrangement be made with the holder, by the maker of the note, and the subsequent indorsers thereon, without the consent of the payee, to prolong the credit, and to discount, by way of renewal, certain bills, drawn by the maker and one of the indorsers, and duly accepted, for the amount of the note, and in the mean time, and until the maturity of the bill, the note is to be deemed extinguished as to the maker, and the indorsers, who have given the bills, the original payee of the note is discharged thereby.

THIS was an action of Assumpsit, originally commenced in the State Court, and removed from thence to this Court, the plaintiffs being a corporation in New York, and the defendant a citizen of Alabama. The action was brought on the following promissory note : " New York, October 31, 1885, ten months

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after date I promise to pay at the Seventh Ward Bank to the order of Mr. Edward Hanrick five thousand two hundred and ninety-one dollars seventeen cents, value received." Signed James G. Kelly.

The note was indorsed by the defendant (Edward Hanrick) in blank; and successively afterwards by Moreley Hooker, and F. A. Lawrence; and was discounted by the bank, who now sued as indorsees. Plea, the general issue.

At the trial it appeared in evidence, that all the parties, except Lawrence, belonged to Alabama. Lawrence lived in New York; and the note was discounted at the instance of a Mr. Greenfield, one of the directors, and the money received by Hanrick, who was, in fact, a mere accommodation payee and indorser, the money being received by him for Kelly, the maker of the note, and Hooker, the indorser, to whom it was paid in equal moieties. At the time when the note became due (on Saturday, the 3d of September, 1836), payment was demanded at the bank by one of the tellers for the bank, but the maker having no funds then in the bank, it was dishonored; and it was protested by the notary of the bank for non-payment, on the same day. He, however, had not presented the note for payment, but it was done for him by a teller at the bank, although his notarial certificate very improperly stated, that he had personally made the presentment. A written notice addressed to Hanrick was put into the post office at New York on the following Monday, addressed to Hanrick at his residence in Montgomery, Alabama. There was conflicting testimony on the point, at what time of the day the notice was put into the post office. On the one hand, a brother of the notary, who was his clerk, stated, that he put the notice into the post office on the next Monday morning. On the other hand, a teller of the bank stated, that he, and not the notary's clerk, put it into the post office after seven o'clock in the evening of the same Monday, and

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he detailed particular circumstances in corroboration of his statement. The southern mail was closed at the post office on Monday at half-past three o'clock, P. M.; and it was proved by a post office clerk, that if the notice had been put into the office before that time, it would have been sent, in the usual course of things, by that mail, and post marked (stamped) the 5th of Sept. If put in after that time, it would have been post marked the 6th of Sept.; and the office did not close until 7 o'clock in the evening. The notice was produced in evidence by Hanrick, and it had the post mark of New York, the 6th of September. There was other evidence introduced by both the parties upon this point of the notice, which was submitted to the jury.

STORY, J. stated to the jury, on this point, that by law it was essential, under the circumstances, to charge Hanrick, that the letter should have been put into the post office at New York on Monday, early enough to have gone by the southern mail of that day; and if the plaintiffs, or their agents, were guilty of negligence in not putting it into the post office in time to go by the southern mail of that day, the defendant was discharged from his liability as indorser. He added, that the *onus probandi* of due notice to Hanrick was upon the plaintiffs; and if the jury were not satisfied, beyond a reasonable doubt, that the notice was not duly given, that doubt would justify a verdict for the defendant. And after commenting upon the evidence, he left the point with this direction to the jury.

Another point made in the defence was, that by subsequent arrangements made between the bank and the other parties to the note, except Hanrick, and without his consent, a prolonged time had been given to those parties for the payment of the debt due on the note; and thereby he was discharged therefrom. As to this point, it appeared in evidence, that

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after the note was dishonored, Lawrence (the indorser) went to Montgomery, Alabama, with the view of arranging the matter, partly for the bank, and partly for his own protection. He there saw Hooker and Hanrick, who admitted, that they had received notice of the dishonor; and he tried to prevail upon them to renew the paper; Hooker was willing and consented to make new paper; Hanrick refused to have any thing to do with it, saying, that he would not assume any further responsibilities; and he refused to indorse any new paper. Afterwards, by arrangements between Lawrence, and Hooker, and Kelly, three bills of exchange were drawn; two were drawn by Kelly and accepted by Hooker, and one was drawn by Hooker, and accepted by Kelly. All the bills were drawn payable at Mobile, Alabama; one dated Sept. 28, 1836, payable at seventy days, for \$1879.50; one of the same date, payable at ninety days, for \$1890; one of the same date, payable at one hundred and twenty days, for \$1950.50; in all \$5,720. Lawrence was on all the drafts as indorser; and they were by him procured to be discounted at the bank, on the 11th of October, 1836, the bank deducting five per cent as the rate of exchange on Mobile, and interest for the time the bills had to run. The balance was then carried to the credit of Lawrence on the books of the bank. Lawrence on the same day (the 11th of October), drew a check on the bank for \$5,291.67 (the amount due on the note); and the check was, "pay James G. Kelly's note." On the same day, there was an entry made in the bank books, under the head of notes, when paid, "Oct. 11, paid," against Kelly's note. Testimony was given by the cashier of the bank and by Lawrence, that these bills were discounted at the bank with an express agreement, that the note of Kelly should remain collateral security for the payment of the bills at maturity, in order to hold Hanrick upon his indorsement on the note. On the other hand, Kelly in his testimony expressly stated,

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that the bills were drawn, "according to his best knowledge and belief, for the purpose of renewing the note," and were negotiated at the bank ; but he, Kelly, had no knowledge of the terms of the negotiation. The whole evidence upon this point also was left to the jury.

STORY, J. in summing up the case, said ; I shall leave the evidence upon this point also for the consideration of the jury, as it seems to me very difficult to reconcile some of the admitted facts with some of the statements made by the cashier of the bank and Lawrence. It is clear, that Lawrence, in procuring these bills, acted as the agent of the bank, as well as for himself, and that the bank must, therefore, be presumed to have had full notice of the purpose, for which the bills were made by Kelly and Hooker. If Lawrence applied them in his negotiation with the bank to any other purpose, than that, for which they were originally made, and confided to him, he was guilty of a fraud upon Kelly and Hooker ; and the bank, if cognizant of such original purpose, cannot be placed in a better predicament, than he would be as holder of the drafts. Now, it is for the jury to say, whether they entertain any doubt, that the bills were actually drawn and accepted by Kelly and Hooker, for the express purpose of being negotiated at the bank, by way of renewal of and to take up the dishonored note, and to procure a delay of payment of the debt during the period, that the bills were to run ; and whether Lawrence and the bank did not, at the time of the negotiation and discount of the bills, fully know, that such was the purpose ; and if so, whether it was not agreed between the bank and Lawrence, that neither he, nor Kelly, nor Hooker, should be proceeded against upon the debt during the period, that the bills were to run, and that the amount of the bills, deducting the discount, should be applied in extinguishment of the note, so far as they were concerned. If the jury are of opinion,

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that such was the real nature and character of the transaction, as understood by all the parties to the bills, at the time of the discount, then Hanrick is not liable upon the note; but the arrangement for such delay and prolongation of credit, being for a valuable consideration, discharged him as an accommodation indorser from all liability on the note. If the arrangement was not of this nature, it is difficult to perceive any motive, on the part of Kelly or Hooker, for drawing or accepting the bills, or of having them discounted at the bank, and paying a large sum for the rate of exchange, as well as for interest, since the proceeds never were otherwise applied to their use, or for the benefit of Lawrence, or Kelly, or Hooker; but remained in the bank until the maturity of the bills.

Rand and Fiske for the plaintiffs; *C. P. and B. R. Curtis* for the defendant.

Verdict for the defendant.

DON GONZALO ALFONSO, CLAIMANT OF ONE HUNDRED
BOXES OF SUGAR v. THE UNITED STATES.

WHERE, in a writ of error, exception was taken to the admission by the Judge of the testimony of merchants and appraisers in Boston, in respect to the market value of sugars in Cuba; *It was held*, that, the market value being a question of opinion, as well as of fact, such testimony was admissible, as being in the nature of evidence by exports, and of the same degree as the evidence of merchants in Cuba.

Exception being, also, taken to the admission of certain evidence, as to prior fraudulent shipments to other parties, made by B, the shipper of the sugar for the claimants, the Judge refused to affirm, that the evidence was improperly admitted.

Exception being, also, taken to the admission of other invoices of shipments

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in July and August, (this shipment being made in May), to show the market value of sugar; *It was held*, that they were properly admitted. The phrase "actual cost" in the revenue Act of 1799, ch. 128, means the actual price paid in a *bona fide* purchase, and not the market value. Where a bill alleged, that certain sugars were fraudulently invoiced at a sum less than "their actual cost and fair market value," which question was directly put in issue by the pleadings, and the judge charged the jury, "that if the goods were found to be invoiced below their fair market value, with intent to defraud, &c. they should find a verdict for the government," to which instruction exception was taken by the plaintiff; *It was held*, that the instruction was proper. *Held, also*, that the agent of the claimants, having assumed, in his oath to the invoice or entry of the shipment, the position of a purchaser, he could not avail himself of the defence that he was not a purchaser, but a producer or manufacturer. *It seems*, that the Revenue Act of 1799, ch. 28, only applies to cases, where an actual purchase has been made.

WRIT of error to a judgment rendered in the District Court. The original suit was a libel of seizure of 100 boxes of sugar for an alleged forfeiture under the 66th section of the Revenue Act of 1799, ch. 128, because "the actual cost of the said sugars at the place of export was not, nor was the fair market value thereof the said sum of three reals for each arroba (at which they were invoiced), but that the said sugars were so invoiced falsely and fraudulently, and with a design to evade a part of the duties, payable thereon to the United States, and that the actual cost, or fair market value, of the said sugars at the place of export was a much larger sum, to wit, the sum of four reals and a half for each arroba;" contrary to the statute, &c.

The claimant, in his plea and answer, averred, that "the said merchandize was not imported contrary to law, and because," he says, "that the actual cost and fair market value of the same at the place of export was the sum of three reals for each arroba, and no more, and that the said merchandize was not invoiced at that rate falsely and fraudulently, and with design to evade the payment of a part of the duties

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payable thereon to the United States, as in the said libel is alleged." The replication puts the matter of the plea and answer in issue, denying their truth.

The cause was heard by a jury, who found a verdict for the United States. At the trial, a bill of exceptions was taken by the claimant, which was as follows:

"The libellants offered to prove by the testimony of appraisers of the custom house and merchants resident in Boston, engaged in the importation and sale of sugars, and who derived their knowledge on the subject from letters and invoices received by themselves in the usual course of their business, and from inspection of the sugars in question, or samples of them, and from their general knowledge of the business, what was the market value of these sugars in Matanzas at the time of exportation.

"The claimant objected to the competency of this evidence, there being in the case the deposition of witnesses, taken by the claimants, resident in Matanzas at the time of exportation, as to the market value of these sugars; but the objection was over-ruled and the evidence admitted.

"The government, in order to show a design to defraud in the present case, offered to prove by the appraisers, that, on one former occasion, they thought an invoice of sugars shipped by one Burnham, by whom this lot was also shipped in behalf of the claimant, and by whom it was invoiced, to be rated below the market value: though no information of such opinion was given to the importer or exporter: and, that on one other occasion, said appraisers had put up an invoice, sent by the same person, believing the same to be rated too low, and the consignee had paid the advance, without making any objection; it not appearing, in either case, that the claimant was interested therein, or had any knowledge thereof.

"The claimant objected to this evidence as incompetent, but the objection was over-ruled and the evidence admitted.

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“The government, in order to show, that these sugars were invoiced below the market value at the time of exportation, which was in April, offered invoices of sugar, some of which were shipped in July and August, it being in evidence, that the market fluctuated, and what was the extent of such fluctuation according to the demand and supply.

“The claimant objected to this evidence, but the objection was overruled and the evidence admitted.

“On the whole evidence it appeared, that these sugars were the produce of a plantation, belonging to the claimant, in the Island of Cuba, and sent by him to this country for sale: no evidence was offered to show, what was the actual cost, and thereupon the claimant prayed the Court to instruct the jury, that the statute on which this information was founded, did not apply to articles belonging to the producer or manufacturer, so as to render them liable to forfeiture, if invoiced below the market value; or, at least, not unless it was also proved, that the actual cost to the producer or manufacturer was higher than the valuation of the invoice.

“But the learned Judge refused so to instruct the jury, and instructed them, that if they believed the goods to be *invoiced below their fair market value*, with intent to defraud, &c. they should find a verdict for the government.”

Judgment having been rendered for the United States, a writ of error was brought by the claimant, and was argued at the present term.

Francis C. Loring for the claimant; *Franklin Dexter*, District Attorney, for the United States.

STORY, J.—I cannot but regret that the Revenue Laws have not undergone a thorough revision and consolidation since the act of 1799, ch. 128, so as to cure the numerous

defects, and supply the obvious omissions (not to speak of the repugnances of the later legislation), which experience has demonstrated to exist in that act. Instead of a plain and uniform statute to regulate this whole matter, we are now driven to an examination of numerous laws, which have been since passed upon the same subject, the provisions of which are not always easily reconcilable with each other, and which present almost endless embarrassments and questions, in their actual application. It is a matter of surprise, that Congress should have left this whole system in such an imperfect state, after the experience of nearly a half century has shown its inadequacy, and have rested satisfied with occasional amendatory laws, which have covered a few blots only, and introduced many new controversies as to their true interpretation and extent. The Court, however, must act upon the system as it is, with a consciousness, however, that, in many cases, it is obliged to rely upon a measuring cast of opinion, without being able to resolve many difficulties to its own entire satisfaction.

I shall consider the objections, in the order in which they stand in the Bill of Exceptions, as at once natural and convenient, premising, however, that upon the state of the pleadings, the true issue before the jury was, whether the sugars in question were invoiced at the port of export, according to their "actual cost and fair market value," to wit, three reals and no more, without any design falsely and fraudulently to evade the payment of the proper duties. The issue was not, whether they were invoiced according to their "actual cost" alone, but according to their "actual cost and true market value," coupling them together, and using them apparently as equivalent expressions. This is a most important consideration to be borne in mind in examining the argument, which has been addressed to the Court, upon the charge of the Dis-

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strict Judge, and to which I shall have occasion hereafter to refer.

The first exception is to the admission of the evidence of the appraisers, and of merchants in Boston engaged in the importation and sale of sugars, as to the market price thereof at the port of export. The objection seems to be founded upon this, that it is, (1), not the best evidence, that the nature of the case admits of; (2), that it is mere hearsay. But it appears to me, that the objection is not supportable, upon either ground. In the first place, the market value is necessarily a matter of opinion, as well as of fact, or rather of opinion gathered from facts. How are we to arrive at it? Certainly not by the mere purchase made by a single person, or by purchases made by a few persons; for in either case, they may have purchased above or below the market price, or the market price may be fluctuating, and the sales too few to justify any general conclusion. Buyers may refuse to buy at a particular price; sellers may refuse to sell at a lower price. In this state of things, we must necessarily resort to opinions of merchants and others, conversant in trade, for their opinions, what, under all the circumstances, is the fair market price or value of the goods. The market price or value, therefore, must in most cases, if not in all, be a matter of fact mixed up with opinion, for it must necessarily include a general price or value in the market, deducible from various averages, and approximations, and the different qualities of the same class of goods. In the next place, the knowledge of the market price being thus, at least in part, a matter of skill, judgment, and opinion, it is in no just sense mere hearsay; but it is in the nature of the evidence of experts. If the evidence of merchants at the port of export might be taken in the case, because of their actual experience and information, that of merchants and appraisers having equal means of knowledge or information from their actual trade and business,

would be equally evidence. Each is evidence in the same degree, and not the one secondary to the other, even if each were not intrinsically of equal value under all circumstances. Indeed, I can conceive of cases where the evidence of Boston appraisers, or Boston merchants, might be of higher value in the estimate of a jury, than that of any foreign merchants at the port of export, from the nature or importance of the case, or different interests of the witnesses. This objection, therefore, is not sustainable. And the same answer may be given to the second objection, which supposes that the testimony of witnesses at Matanzas as to the market value was of a higher degree than that of witnesses in Boston. It might weigh more or less with a jury, according to circumstances, than the testimony of the Boston witnesses. But the evidence would not be higher in its nature, character, or degree, in a technical sense. It might have more or less weight; but that would not degrade it to an inferior class of evidence.

The next objection is to the admission of the evidence of the appraisers, as to prior shipments by Burnham (the shipper of these sugars for the claimant), and of invoices accompanying the same, being in their judgment, invoiced below the market value, the other shipments not belonging to the claimant, nor he being shown to have any knowledge thereof. I confess, that I have felt some difficulty upon this point; and I should have been glad that the original bill of lading of the present shipment, and the invoice thereof, and the entry thereof at the custom house, had been put into the case, so that it might have been shown, in what precise manner the bill of lading and invoice were made out; whether Burnham appeared thereon solely as the shipper, or whether it was added, that the shipment was on account and risk of the claimant, and also what the entry and oath administered on the occasion purported to state. As I understand the case, however, Burnham made out the invoice as the agent of the

claimant in the shipment; and, therefore, the invoice value of the sugars must be understood as the value put upon the same, with the full assent of the claimant, as the actual cost to him. We must then, as it seems to me, treat Burnham as the general agent of the claimant in this matter. And the question comes shortly to this, whether an agent employed in other transactions of a similar nature for other persons, whose conduct is open to suspicion, as to his readiness to coöperate in a fraudulent evasion of duties in those cases, may not, in the claimant's case, be equally open to the like suspicion, so as to let in his conduct as in some degree affecting the *bona fides* of his invoice for the claimant. I confess, that the fact, *per se*, would not alone have much weight; but combined with other circumstances, inflaming the suspicion of fraud, I am not entirely satisfied, that it was not admissible in evidence, although the claimant is not shown to be directly privy to it. Suppose the argument at the bar to be urged, that the agent ought to be deemed as acting *bonâ fide*, for, as a mere agent, he could have no motive to deceive or aid in a fraud, would not the argument be met and overturned by showing, that no scruple of this sort had been seen in his prior shipments. Without, therefore, saying, that I feel free from all doubt on this point, I cannot affirm, that there was error in the learned Judge in admitting the evidence, *valere quantum valere possit*.

The next objection is to the admission of the evidence of other invoices of shipments in July and August, 1842, (the present shipment having been made in the preceding May), in order (as I understand it) to show the market value, at those times, of like sugars at the port of export. I see no reason to exclude this evidence; although it would not and ought not ordinarily to be decisive as to the market value in May. There may be fluctuations in the market during the intervening period between May and August; and, indeed, there was evidence (it seems) in this case to show, that such

fluctuations actually existed. Still, however, upon a question of market value — a subject, in its nature, somewhat indeterminate, and of opinion, — it appears to me, that evidence of this sort is admissible, as affording the means of approximation to the true market value at the time. Its weight would depend upon other circumstances, which might enhance or diminish it.

Having disposed of these minor questions, we come, in the last place, to the main question in the case, which is as to the ruling of the learned Judge in refusing the instruction prayed for on behalf of the claimant, and the actual instruction given by him to the jury, “that if they found the goods to be invoiced below their fair market value, with intent to defraud, &c. they should find a verdict for the government.”

Now, upon the actual issue before the jury, the real question was, whether the sugars were invoiced at their actual cost and fair market value; and I do not, therefore, well see how the learned Judge could otherwise have instructed the jury on that point. The main objection, that exists, is to the instruction prayed and refused by the Court. And this involves several important considerations. In the first place, as to the construction of the 66th section of the Revenue Act of 1799, ch. 128. I adhere to the doctrine laid down in the cases cited at the bar, *United States in Error v. Sixteen Packages of Goods* (2 Mason R. 48); and *Tappan in Error v. United States* (2 Mason R. 393); that “actual cost” in that section means the actual price paid for the goods by the party in the case of a real *bonâ fide* purchase, and not merely the market value of the goods. But then the market value may and often is justly resorted to as a means of ascertaining the actual cost in doubtful and suspicious cases, for it may be fairly presumed, in ordinary cases, that the market value, and no more, and no less, is generally given for the commodity. The terms, however, are not identical in their meaning, nor

is the one necessarily the true interpretation of the other. It is observable in the present case, that in the pleadings and issue, the parties have used the words as exact equivalents, and treated the fair market value as the actual cost, and the actual cost as the fair market value.

In the next place it must be taken also, upon the pleadings and evidence, as a clear concession, that the goods were invoiced at their actual cost and fair market value by the shipper, (the agent of the claimant), with the consent of his principal; and thus he has placed himself in the invoice and entry in the predicament of a purchaser, and not in that of a producer or manufacturer of the article. If the invoice and entry purport to state the actual cost, or the market value of the sugars, as a purchase, is it competent in point of law for the claimant now to set up a different case, and to avail himself of the defence, that he was not a purchaser, but a producer or manufacturer. Now, in this view, it is most important to consider that the act of the 1st of March, 1823, ch. 149, has in the 4th section prescribed the different oaths to be taken in the entry by the consignee, or importer, or agent, and by the owner of the goods, and also by the manufacturer or owner, who has not purchased the goods,¹ when he enters the same. Where the goods are entered by the consignee or importer, or agent, he is required to swear, that the invoice exhibits the actual cost, if purchased, or the fair market value, if otherwise obtained. Where the owner enters the goods, he is to swear to their actual cost, including all charges; and where the manufacturer or owner who has not purchased the goods enters the same, he is to swear, that the invoice contains a just and faithful valuation thereof, at the fair market value. Now, as the invoice and entry, in the present case, are not before me, I cannot say, which of these oaths was

¹ See, also, Act of 14th July, 1832, ch. 224, § 15.

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taken by the consignee. But, regularly, it ought to have been, and, therefore, I presume it was, that the invoice exhibited the actual cost (if purchased), or the fair market value (if otherwise obtained). If the consignee made the entry, referring to the invoice of the sugars, as exhibiting their actual cost, then it seems to me, that he cannot now be permitted to make a different case for the claimant, and insist, that it was no purchase, but a manufacture by the claimant.

In the next place, the instruction asked and denied, requires the Court to ascertain and decide, that the sugars in controversy were the produce of a plantation belonging to the claimant in the Island of Cuba, and sent by him to this country for sale. Now, the Court had no right to assume this, unless it was admitted on the part of the United States; and although stated in the exception, there is no admission, and no evidence of the fact on the record.

In the next place, it may be true, that the 66th section of the act of 1799, ch. 128, in that part, which declares, that if goods are not invoiced according to the actual cost, with design to evade the duties, then only they shall be forfeited, does not apply to cases, where the goods belong to the producer or manufacturer, and are invoiced below the market value, if that market value be not below the actual cost; and yet upon an issue like the present, the Court might not be bound to give that instruction, as not being relevant to that issue. Indeed, with reference to such an issue, the point might be purely an abstract point. But what could seem to be decisive is, that it is plain, that such an instruction could not be asked of the Court, unless the claimant could show, that by his invoice and entry, he put his case upon the allegation, that the valuation was the fair market value of the goods, and did not put it upon the ground that the valuation was the actual cost of the goods. I very much incline to hold the opinion, that the 66th section of the act of 1799, ch. 128, so

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far as it inflicts a forfeiture, does not apply, except to cases where an actual purchase has been made, and of course where the invoice ought to be of the actual cost upon such purchase. Still, however, I do not decide the point, because in my view of the present case, it is not fairly presented upon the pleadings and evidence, in such a manner as to call upon the Court to decide it. In this view of the whole matter, my opinion is, that the learned Judge was right in refusing the instruction in the terms and under the circumstances in which it was prayed.

The judgment of the District Court is, therefore, affirmed with costs.

ELEAZER CARVER v. BRAINTREE MANUFACTURING COMPANY.

THE Patent Act of 1836, ch. 357, sect. 13, and the Act of 1837, ch. 45, sect. 8, authorizing the re-issue of a patent, because of a defective or redundant specification or description, without fraud, or for the purpose of adding thereto an improvement, do not require the patentee to claim, in his renewed patent, all things, which were claimed in his original patent, but gives him the privilege of retaining whatever he deems proper. Where the plaintiff, in a patent for "a new and useful improvement in the ribs of the cotton gin," claimed, as a part of his invention, the increasing the space between the upper and lower surface of the rib, either "by making the ribs thicker at that part, or by a fork, or by any other variation of the particular form; *It was held*, that the claim was sufficiently accurate as a matter of law, and that it was not necessary, that he should describe all possible modes by which the rib might be varied, but only the most important, and that mere formal variations therefrom would be violations of the patent.

Objections, that a patented invention is old; or that the specification in a patent does not clearly describe the mode of making the machine; or that the original and the renewed patent are not for the same invention; or that either were obtained with a fraudulent intent; all involve matters of fact, and are for the jury, upon the evidence, to decide.

Where the original patent was for "a new and useful improvement in the ribs of saw gins for ginning cotton," and the renewed patent was for "a new and useful invention in the manner of forming the ribs of saw

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gins for ginning cotton," and in the renewed patent was claimed, in addition to the thickness of the rib, the sloping up of it so as to leave no shoulder; *It was held*, that the claim in the renewed patent, was not for two distinct improvements, but for additional parts of the same improvement, and that the same thing was patented in both patents.

Patents are to be interpreted by a consideration of the whole instrument, and it is to be thereby determined what thing is intended to be patented.

The Statute of Massachusetts of 1821, ch. 28, relating to the individual liabilities of members of manufacturing corporations, is to be construed as a remedial statute, and the phrase "debts contracted," as employed therein, means not only debts in the strict sense of the term, but any liabilities incurred by the Corporation. If the liability be for unliquidated damages arising from contract or *tort*, it relates to the time of its origin, and not of its liquidation; and, therefore, *It was held*, that the testimony of Edson, who was a member of the Corporation at the time when the liability asserted in the present suit arose, must be rejected, although he had since sold out all his interest.

CASE for infringement of a patent, dated the 16th of November, 1839, for "a new and useful improvement in the ribs of the cotton gin." The present patent was a renewed patent, granted upon the surrender of the original patent, dated the 12th of June, 1838, which was cancelled on account of a defective specification. The specification annexed to the original patent was as follows: "*To all whom it may concern: Be it known that I, Eleazer Carver, of Bridgewater, in the county of Plymouth, and State of Massachusetts, have invented a certain improvement in the manner of forming the ribs of saw gins, for the ginning of cotton, and I do hereby declare, that the following is a full and exact description thereof:*

"In the cotton gin, as heretofore known and used, the fibres of the cotton are drawn by the teeth of circular saws through a grating formed of a number of parallel bars or ribs, having spaces between them sufficient to allow the saws to pass, carrying the fibres of the cotton with them (which are then brushed off by a revolving brush), but not wide enough to let the seeds and other foreign substances pass through.

Above the saws, the ribs come in close contact, thus forming a shoulder at the top of the space between them.

“ Various forms have been given to the bars or ribs, with a view to procure a free passage for the cotton, but the cotton gin, as heretofore made, has been always subject to the inconvenience of the grate becoming choked by hard masses of cotton, and motes, or false seeds, collecting in the upper part of the spaces between the ribs, and impeding the action of the saws, and also preventing the mass of cotton, which is drawn by the saws up to the top of the spaces, but not drawn through them, from rolling back freely, so as to pass again over the saws, as it should do.

“ My improvement, which I am about to describe, is intended to obviate these difficulties, and it consists in giving a new form to the ribs composing the grate. Instead of making the ribs of a bar of iron of equal thickness throughout, so that the upper and under surfaces shall be parallel, I so form the rib that at the part where the saws pass through, carrying the cotton with them, the space or depth between the upper or outer surface, and the lower or inner surface, shall be greater than the thickness of the rib in other parts has heretofore been, or needs to be, and so great as to be equal to the length of the fibre of the cotton to be ginned, so that the fibre shall be kept extended between the ribs for about its full length, while it is drawn through them by the saws. This will, of course, require either that the rib should be as thick at that part as the length of the fibre, or that the rib should be forked or divided about that part, so that the upper or outer surface and the under or inner surface shall diverge to that distance from each other, instead of being parallel, as formerly, when the rib was made of one bar of uniform thickness. This under or inner surface then takes a new direction upwards, and slopes toward the upper or outward surface, until the two surfaces meet above the periphery of the saw.

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This last described part of the under surface is fastened against the frame-work of the gin.

“The operation of this improvement is, that those fibres of the cotton, which are so firmly caught by the teeth of the saws as to be disengaged from the mass of the cotton to be ginned, are drawn out to their full length, and pass clear through the grate, and are then brushed off by the revolving brush, while the fibres that are drawn into the grate, but are not caught by the teeth of the saws firmly enough to be carried quite through, are disengaged, and pass up to the point, where the under surface meets the upper surface above the saws, and finding no obstruction there, pass back out of the grate without choking it, and roll down again with the mass of the unginned cotton, and are then caught below by the saws and carried up again, and so on, until all the fibres are drawn through.

“Having thus described my improved rib, and its advantages, I now claim as my invention, and desire to secure by letters patent, the increasing the depth or space between the upper or outer surface of the rib and the lower or inner surface of it, at the part where the cotton is drawn through the grate, so that it shall be equal to the length of the fibre of the cotton to be ginned (whether this be done by making the ribs thicker at that part, or by a fork or division of the rib, or by any other variation of the particular form), and I also claim, as part of the same improvement, the sloping up of the lower or inner surface of the rib, so as to meet the upper or outer surface above the saws, leaving, when the rib is inserted into the frame, no break or shoulder between the two surfaces, but a smooth and uninterrupted passage upwards between the ribs as above described.”

The defendant pleaded the general issue, and also filed special matters of defence.

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Willard Phillips and *Fletcher*, for the defendants, at the trial made several points of defence, which, however, are sufficiently referred to in the opinion of the Court, delivered at the trial, and hereinafter stated.

Franklin Dexter, for the plaintiff, denied the validity of all the objections. As the matters of objection were afterwards fully considered in the arguments for a new trial, they are here also admitted.

At the trial one Edson, who was a member of the corporation (the defendants), at the time of the supposed infringement, but had since sold out his interest, was offered as a witness for the corporation. But upon an objection by the plaintiff, his testimony was rejected, as being inadmissible, as he still had an interest in the event of the suit. The Court, however, ruled out the testimony, *hesitanter*, expressing a desire to reëxamine it, if the verdict should be for the plaintiff.

A great deal of evidence was introduced on each side ; but the questions, on which the cause seemed principally to rest, were questions of law, and were accordingly argued by the counsel in the course of the trial.

STORY, J., upon the close of the arguments, said : So far as the questions of fact are concerned, I shall leave them for the consideration of the jury, if upon the whole evidence the counsel desire it. But the questions of law are those, upon which I am ready to express my present opinion, subject to reëxamination, if the counsel shall wish any of them to be more deliberately considered. The first objection is, that the specification has not sufficiently described the mode of making the improvement, or in such full, clear and exact terms as to enable a skillful mechanic, skilled in the art or science to which it appertains, or with which it is most nearly connected, to make or construct it. This is certainly a matter mainly of

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fact. It is true, that the plaintiff, in his specification, in describing the thickness of the rib in his machine, declares, that it should be so thick, that the distance or depth between the upper and the lower surface should be "so great as to be equal to the length of the fibre to be ginned," which, it is said, is too ambiguous and indefinite a description to enable a mechanic to make it, because it is notorious, that not only the fibres of different kinds of cotton are of different lengths, long staple, and short staple ; but that the different fibres in the same kind of cotton are of unequal lengths. And it is asked, what then is to be the distance or depth or thickness of the rib ? Whether a skilful mechanic could from this description make a proper rib for any particular kind of cotton, is a matter of fact, which those only, who are acquainted with the structure of cotton gins, can properly answer. If they could, then the description is sufficient, although it may require some niceties in adjusting the different thicknesses to the different kinds of cotton. If they could not, then the specification is obviously defective. But I should suppose, that the inequalities of the different fibres of the same kind of cotton would not necessarily present an insurmountable difficulty. It may be, that the adjustment should be to be made according to the average length of the fibres, or varied in some other way. But this is for a practical mechanic to say, and not for the Court. What I mean, therefore, to say on this point is, that, as a matter of law, I cannot say, that this description is so ambiguous, that the patent is upon its face void. It may be less perfect and complete, than would be desirable ; but still it may be sufficient to enable a skilful mechanic to attain the end. In point of fact, is it not actually attained by the mechanics employed by Carver, without the application of any new inventive power, or experiments ? If so, then the objection could be answered as a matter of fact or a practical result.

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The next objection is, that the patentee has omitted **some** things in his renewed patent, which he claimed in his **original** patent as a part of his invention, viz. the knob, the ridge, **and** the flaring of the lateral surface of the rib above the **saw**, **and** that he claims in his renewed patent the combination of the thickness and the slope of the front and back surfaces of the rib. Now, by the 13th section of the Patent Act of 1836, ch. 357, it is provided, that whenever any patent, which is granted "shall be inoperative or invalid by reason of a defective or insufficient description, or specification, or by reason of the patentee claiming in his specification as his own invention more than he had or shall have a right to claim as new, if the error has or shall have arisen by inadvertency, mistake, or accident, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, and the payment of the further sum of fifteen dollars, to cause a new patent to be issued to the inventor for the same invention, for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification." And it is afterwards added, that, "whenever the original patentee shall be desirous of adding the description of any new improvement of the original invention or discovery, which shall have been invented or discovered by him subsequent to the date of his patent, he may, like proceedings being had in all respects as in the case of original applications, and on the payment of fifteen dollars, as hereinbefore provided, have the same annexed to the original description and specification." The act of 1837, ch. 45, § 8, further provides, "that whenever any application shall be made to the commissioner for any addition, or a newly discovered improvement, to be made to an existing patent, or whenever a patent shall be returned for correction and reissue, the specification annexed to every such patent shall be subject to revision and

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restriction, in the same manner as original applications for patents; the commissioner shall not add any such improvement to the patent in the one case, nor grant the reissue in the other case, until the applicant shall have entered a disclaimer, or altered his specification of claim, in accordance with the decision of the commissioner."¹

Now, I see nothing in these provisions which upon a reissue of a patent requires the patentee to claim all things in the renewed patent, which were claimed as his original invention, or part of his invention in his original patent. On the contrary, if his original patent claimed too much, or if the commissioner deemed it right to restrict the specification, and the patentee acquiesced therein, it seems to be, that, in each case, the renewed patent, if it claimed less than the original, would be equally valid. A specification may be defective and unmaintainable under the patent act, as well by an excess of claim, as by a defect in the mode of stating it. How can the Court in this case judicially know, whether the patentee left out the knob, and ridge, and flaring of the lateral surface of the rib, in the renewed patent, because he thought, that they might have a tendency to mislead the public by introducing what, upon further reflection, he deemed immaterial or unessential, and that the patent would thus contain more than was necessary to produce the described effect, and be open to an objection, which might be fatal to his right, if it was done to deceive the public?² Or, how can the Court judicially know, that the commissioner did not positively require this very omission? It is certain, that he might have given it his sanction. But I incline very strongly to hold a much broader opinion; and that is, that an inventor is always at liberty in a renewed patent to omit a part of his original invention, if he

¹ See Act of 1836, ch. 357, § 7.

² Act of 1836, ch. 357, § 15.

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deems it expedient, and to retain that part only of his original invention, which he deems it fit to retain. No harm is done to the public by giving up a part of what he has actually invented; for the public may then use it; and there is nothing in the policy or terms of the patent act, which prohibits such a restriction.

The other part of the objection seems to me equally untenable. If the description of the combination of the thickness and the slope of the front and back surfaces of the rib, were a part of the plaintiff's original invention (as the objection itself supposes), and were not fully stated in the original specification, that is exactly such a defect, as the patent acts allow to be remedied. A specification may be defective, not only in omitting to give a full description of the mode of constructing a machine, but also in omitting to describe fully in the claim the nature, and extent, and character of the invention itself. Indeed this latter is the common defect, for which most renewed patents are granted.

Another objection is, that the plaintiff, in his claim, has stated, that the desired distance or space between the upper and the lower surfaces of the rib, whether it "be done by making the ribs thicker at that part, or by a fork or division of the rib, or by any other variation of the particular form," is a part of his invention. It is said, that the modes of forking and dividing are not specified, nor the variations of the particular form given. This is true; but then the patent act requires the patentee to specify the several modes, "in which he has contemplated the application of the distinguishing principle or character of his invention."¹ Now, we all know that a mere difference of form will not entitle a party to a patent. What the patentee here says in effect is: One important part of my invention consists in the space or distance between the

¹ Act of 1836, ch. 357, § 6.

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upper and lower surfaces of the ribs, and whether this is obtained by making the rib solid, or by a fork, or division of the rib, or by any other variation of the form of the rib, I equally claim it as my invention. The end to be obtained is the space or distance equal to the fibre of the cotton to be ginned; and you may make the rib solid, or fork it, or divide it, or vary its form in any other manner, so as that the purpose is obtained. The patentee, therefore, guards himself against the suggestion, that his invention consists solely in a particular form, solid, or forked, or divided; and claims the invention to be his, whether the exact form is preserved, or not, if its proportions are kept so as to be adapted to the fibre of the cotton which is to be ginned. In all this I can perceive no want of accuracy or sufficiency of description, at least so far as it is a matter of law, nor any claim, broader than the invention, which is either so vague or so comprehensive, as, in point of law, not to be patentable. It was not incumbent upon the patentee to suggest all the possible modes by which the rib might be varied, and yet the effect produced. It is sufficient for him to state the modes which he contemplates to be best, and to add, that other mere formal variations from these modes he does not deem to be unprotected by his patent.

Another objection is, that the patentee has not sufficiently described the slopes between his ribs, so as to make the description intelligible, or to enable a skilful mechanic to construct them. Whether this be so, or not, is not a matter of law upon the face of the patent, but a matter of fact for the jury, if there be any serious doubt about it.

Some other objections have been taken, such as, that the invention is not new, that the original patent and the renewed patent are not identical for the same invention, and that the patent was obtained with a fraudulent intent, for the purpose of covering the invention of Copeland, which has been patented and sustained in this Court against the claim of the

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plaintiff. But these all involve matters of fact, which belong to the province of the jury, upon the evidence, with which I do not intermeddle, and upon which the parties are at liberty to take the opinion of the jury.

I have thus stated summarily, according to the suggestions of the counsel for the defendants, my own views of the patent, and of the objections taken thereto. I have stated them in my own language ; and with a view to make my own meaning clear. I cannot admit, that I am bound to respond to the very terms, in which the objections are taken, or to give instruction to the jury, affirming or denying them, without qualification or explanation. If the counsel for the defendants wish for a more deliberate examination of the points of law, after the trial is over, they can be brought again before this Court, upon a motion for a new trial ; or, if a verdict is given to the plaintiff to an amount, which will justify an appeal, the opinion of the Supreme Court may be taken upon the matters of law.

Upon these statements of the Court, the defendant's counsel elected not to go to the jury, and a verdict was by consent taken for the plaintiff, for \$960.50, subject to the opinion of the Court upon the matters of law ; and also to the ruling of the Court as to the inadmissibility of one Edson, who was at the time of the supposed infringement, a member of the corporation, and had since sold out his interest ; and whom the Court rejected as a witness for the corporation.

In the trial of this case the following rulings were excepted to by the defendants :

The defendants understand the following points to have been ruled by the Court, viz. " That the describing and claiming the increasing of the distance from where the cotton goes in, to where it comes out from between the grates, to be equal

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to the length of the fibres of cotton to be ginned, is a sufficiently accurate, specific, and definite description and claim.

“That the patentee had a right to drop the things patented in his original patent, viz. the knob, the ridge, and the flaring of the lateral surface of the rib above the saw, and patent in his renewal, the combination of the thickness and the slope of the front and back surfaces of the rib.

“That the claiming of the increasing of the distance from where the cotton enters to where it comes out from between the ribs, by forking, division, or any variation of the particular form, is not claiming too much.

“That the patentee had a right to claim, and patent, the knob or projection F, in his renewal, of the same width as the rib, notwithstanding he had described and patented the same in his original as narrower than the rib.

“That the patentee was not bound to specify the modes of forking, and division, and variations of the particular form claimed and patented by him.

“That the original was invalid and inoperative, within the provisions of the patent law for a renewal.

“That the patentee, by specifying the distance, which the cotton is carried between the ribs, and not claiming the same, as an element of his patent, did not thereby abandon the same.

“That the patentee, by distance, which the cotton was so carried to be equal to the “full” length of the fibre in the original, was not thereby precluded from claiming and patenting that distance, caused by thickness of the rib or otherwise, equal to the average length of the fibres on one seed, in his renewal.

“That the patent describes, and claims with sufficient clearness, and exactness, a slope between the ribs.

“That the specification states sufficient elements for a pa-

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tent for a combination, and adequately specifies, points out, and claims a combination.

"That John Edson was interested in the event of the suit, and by reason of such interest, was incompetent as a witness.

"It was, as the counsel for the defendants understood the case, established by the testimony, and not disputed, that the thickness of the grate, or distance that the cotton passed between the grates, and the obliquity or slope of the shoulder, as specified by the plaintiff, were neither of them new."

Phillips and Fletcher, for the defendant, now moved for a new trial.

Franklin Dexter, for the plaintiff.

STORY, J. — To many of the objections, stated in the motion for a new trial, to the supposed rulings of the Court, a very brief answer may be given. In the first place, I cannot admit, that they are in terms the actual rulings of the Court, upon the points in controversy at the trial; and since they have been furnished to me, I have drawn out at large the views, which I then suggested upon the points in controversy at the trial; so that my actual meaning should be accurately understood. Upon further reflection, I do not feel it necessary to add to the views there suggested. They were as follows: [Here the Judge recapitulated the remarks already cited as made at the trial.] I see no reason to be dissatisfied with what was then said; and if the observations then made were correct, it seems to me, that they dispose of the principal objections, at least, so far as my own judgment is concerned. They might be elaborated; but they contain the substance of all, that I desire to say on these points.

One point is, however, now brought out upon the argument for a new trial, which was not so fully suggested at the

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trial, and, indeed, which arose so incidentally, that it was scarcely a matter calling for any very positive expression of the opinion of the Court. It is now said, that the plaintiff's claim is, in fact, for a new combination, a combination of a rib of a particular thickness, with the particular sloping up of his rib, as described in the specification ; and that it is not the thing which is patented. It appears to me, that there is more of refinement in the form of this objection, than there is of difficulty in resolving it. The renewed patent is, in terms, a patent for "a new and useful improvement in the ribs of saw gins for ginning cotton." The original patent is substantially like it in the descriptive words. It is for "a new and useful improvement in the manner of forming the ribs of saw gins for ginning cotton." The language of the specification annexed to the renewed patent is, for "an improvement in the manner of forming the ribs of saw gins for ginning cotton." So that in substance we may clearly see, that the same improvement is designed to be included in the descriptive words. In the summing up of his claim in this last specification the patentee says : "I now claim as my invention, and desire to secure by letters patent, the increasing the depth or space between the upper or outer surface of the rib, and the lower or inner surface of it, at the part where the cotton is drawn through the grate, so that it shall be equal to the length of the fibre of the cotton to be ginned (whether this is done by making the ribs thicker in that part, or by a fork, or division, or by any other variation of the particular form) ; and I also claim as a part of the same improvement the sloping up of the lower or inner surface of the rib, so as to meet the upper or outer surface above the saws, leaving, when the rib is inserted into the frame, no break, or shoulder between the two surfaces, but a smooth and uninterrupted passage upwards between the ribs, as above described." The drawings annexed to the specification are designed to make the description more

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palpable and clear. And it is not without significance in the case to remark that, as the patent is for an improvement upon the common cotton gins, it pre-supposes, on the part of those interested in the matter, a full knowledge of the machinery and structure of the common gins. Now, to me it is perfectly clear, that the present patent is founded upon a claim for one entire thing, that is, for an improved rib, or a specified improvement upon the common rib of cotton gins. It is not a claim for two distinct and independent improvements, each susceptible of a distinct operation, or each claimed as a distinct invention; but both are claimed as parts and parcels of the same improvement, and necessary thereto. I do not say, whether each of the specified things, going to make up the entire improvement, might not have been separately claimed as several inventions. That is not a necessary point in the present case. What I mean to say is, that they are not so summed up in the claim; but they are summed up as making an entirety. They go to make up the improved rib, which is patented. That rib is the thing claimed, and not the thickness or depth or space of the rib alone, or the sloping up of the surfaces thereof alone. Both are claimed as parts of the same improvement, but neither alone as constituting it. I see no objection to its being called a combination of particular forms and arrangements of structure to complete the improved rib. In a just sense, that is a combination which requires different things or different contrivances or different arrangements to be brought together, to accomplish the given end. But it is far from following from this, that the combination is not and may not be treated as an entirety.

There is no magic in words; and above all, in patents, the Court looks through the whole patent and specification, in order to ascertain what the thing claimed and patented is; whether it is for an entirety, or for various distinct improvements, capable of a distinct operation, and independent use

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in the same machine, or for both ; or whether it is for a combination of two or more things in a particular machine, to produce a given result, or for a simple or single improvement in a particular machine ; or whether it is for any one or more of them. There is no artificial or universal rule of interpretation of such instrument beyond that which common sense furnishes, which is to construe the instrument as a whole, and to extract from the descriptive words and the claim, what the invention is, which is intended to be patented, and how far it is capable of exact ascertainment, and how far it is maintainable in point of law, supposing it clear from all ambiguity.

Now, looking at the present patent, it seems to me impossible to entertain any real doubt as to its true interpretation. It is, as the words of the claim state it to be, for a single thing — “an improved rib.” The improvement is upon the existing rib in the cotton gin, and consists in two things, neither of which (as has been already suggested) is claimed separately, but both together, as constituting one conjoint improvement. It appears to me, that the claim sufficiently expresses the real nature, extent, and character of the improvement, and is in perfect compliance with the 6th section of the Patent Act of 1836, ch. 357. I should not have thought it necessary to consider this objection so far, if it had not been for the zeal and ingenuity, with which it has been pressed upon the Court. Call the improvement an entirety, or a combination, as we may please, it is still a patent for “an improved rib,” and nothing more.

The remaining objection is to the rejection of the testimony of Edson. And here it is, that I have entertained some doubt, upon which I was desirous of hearing the further argument, which has now been had. The defendants were created a corporation by the Statute of Massachusetts of the 14th of June, 1823, and were, of course, made subject to all the liabilities and requirements of the general statute of 1821, ch.

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28, respecting the liabilities of manufacturing corporations. That statute provides "that every person, who shall become a member of any manufacturing corporation, which may be hereafter established in this commonwealth, shall be liable in his individual capacity for all debts contracted during the time of his continuing a member of such corporation." The question turns, therefore, upon the meaning of the words "debts contracted," in the statute. Do they mean literally and strictly such debts as are due and payable in money, *ex contractu*, by the positive or implied engagements of the corporation, and resolve themselves into liquidated or determinate sums of money, due as debts,¹ or do they extend to all legal liabilities incurred by the corporation, and which, when fixed by a judgment, or award, or otherwise, are debts of the corporation? And if the latter be the true meaning, then, does the statute liability exist only from the time when it becomes an ascertained debt of the corporation, or does it relate back to the origin of the liability, and bind the corporators from that time?

If the words "debts contracted," in the statute, are to receive the limited construction, that they are applicable only to debts in the strict sense of the term, that is, contracts of the party for the payment of money, and nothing else, it is obvious, that the purposes of the statute, which although, in some sense, it may be deemed penal, is also in another sense remedial, would be comparative of little value. Suppose the case of a contract by the corporation to do work, or to manufacture goods of a particular quality or character, or to furnish materials, or to buy cotton or wool undelivered, or to build houses, or to employ workmen; and the contract should be entirely unperformed, and broken, and refused to be performed, so that the right of the other party would be, not to money, but to unliquidated

¹ See 2 Black. Comm. 464; 3 Black. Comm. 154.

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damages for the non-performance or refusal to perform; if these, which are by no means uncommon contracts, should be without the purview of the statute, it would have a very narrow and inadequate range and operation. Yet such cases sound merely in damages. Suppose a manufacturing corporation to obstruct its neighbor's mill-privilege, or stop his mill works, by back flowage, if such acts be not within the protection of the statute, we see, at once, that an insolvent corporation might do irreparable mischief without any just redress to the other party. Suppose such an insolvent corporation should unlawfully, under an unfounded claim of right, convert 100 or 1000 bales of cotton belonging to a third person, we see, that the mischief could be redressed only by an action of trover for unliquidated damages; and if the individual corporators were not liable therefor, after an unsatisfied judgment, the statute would be little more than a delusion. If, on the other hand, we should construe the statute broadly as a remedial statute, and give to the word "debts," a meaning, not unusual, as equivalent to "dues," and to the word "contracted," a meaning, which, though more remote, is still legitimate, as equivalent to "incurred;" so that the phrase, "debts contracted," in this sense would be equivalent to "dues owing," or "liabilities incurred," the statute would attain all the objects for which it seems designed. The Supreme Court of Massachusetts, in the *Mill-Dam Foundry v. Hovey* (21 Pick. 455), held, under the Statute of 1829, ch. 53, § 6, which makes the stockholders liable for the debts of the corporation, that the term "debts" included a claim for unliquidated damages. That was a case arising *ex contractu*; but the language certainly extends the term "debts" beyond its close and literal meaning. And if it covers cases of unliquidated damages, *ex contractu*, it is difficult to say, why it should stop there, and not go further and cover cases of unliquidated damages arising from torts to property. In each case there is

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no debt until the damages are ascertained and liquidated ; and then the debt seems to relate back to its origin. Blackstone says, "a debt of record is a sum which appears to be due by the evidence of a Court of Record: thus, when any specific sum is adjudged to be due from the defendant to the plaintiff in an action or suit at law, this is a contract of the highest nature, being established by the sentence of a Court of judicature."¹ Here Blackstone manifestly included all sorts of actions or suits, where the judgment is for a sum certain, whatever may be its nature or origin.²

I agree that it is no part of the duty or functions of Courts of justice, to supply the deficiencies of legislation, or to correct mischiefs which they have left unprovided for. That is not the question here. But the question is, whether, if the words of a statute admit of two interpretations, one of which makes the legislation incomplete for its apparent object, and the other of which will cover and redress all the mischiefs, that should be adopted, in a statute confessedly remedial, which is the most narrow, rather than that which is the most comprehensive, for the reason only, that the latter will create an obligation or duty, beyond what is imposed by the common law?

It seems clear, that, in common parlance, as well as in law, the term is in an enlarged sense some times used to denote any kind of a just demand.³ And in the Roman law it had sometimes the like enlarged signification. *Sed utrum ex delicto an ex contractu Debitor sit, nihil refert*, says the Digest.⁴

Upon this subject I confess that with all the lights which

¹ 2 Black. Comm. 464 ; 3 Black. Comm. 160.

² 2 Black. Comm. 464 ; 3 Black. Comm. 160, 161 ; Com. Dig. Debt, A. 2.

³ See *Commonwealth v. Keeper of Philadelphia Prison* (4 Serg. & R. 506) ; *Gray v. Bennett* (3 Metcalf, R. 522, 526).

⁴ Dig. Lib. 5, tit. 3, l. 14 ; Pothier, Pand. lib. 50, tit. 16, n. 69.

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have been thrown upon the question by the able arguments at the bar, I am not without some lurking doubts. But having reflected much upon the subject, and being in the same predicament, which Lord Eldon is said to have suggested as having sometimes occurred to himself, that he felt doubts, but was unable to solve them to his own entire satisfaction, I have at length come to the conclusion that the rejection of the witness as an interested witness was right. I follow out the doctrine of the case of the *Mill-Dam Foundry v. Hovey* (21 Pick. R. 455), which, as far as it goes, disclaims the interpretation of the word, "debt" as limited to contracts for the payment of determinate sums of money. Passing that line, it does not seem to me easy to say, that if cases of unliquidated damages may be treated as debts, because they end in the ascertainment of a fixed sum of money, that we are at liberty to say, that the doctrine is not equally applicable to all cases of unliquidated damages, whether arising *ex contractu* or *ex delicto*. If ultimately it ends in a debt, as a judgment for damages does, that case asserts, that its character as a debt relates back to its origin. Besides, it seems to me upon principle to be reasonable, if not absolutely justified by authority, to hold, that if the transaction occurs while a person is a member of the corporation, and he would, if he remained a member, be liable for the ultimate debt adjudged, it may well be treated as an inchoate debt consummated by the judgment. Since the argument was had, my attention has been called to the case of *Gray v. Bennett* (3 Metcalf's R. 522, 530, 531), which, in several respects, confirms the reasoning, which I had previously adopted, in relation to the meaning of the word "debt," and the construction which it ought to receive in a remedial statute. If I had seen that case at an earlier period, it would have somewhat abridged my own researches on the same subject.

The result is, that the motion for a new trial is over-ruled, and judgment must pass for the plaintiff.

TAPPAN WENTWORTH, IN ERROR, v. UNITED STATES.

By the Act of May 7th 1822, ch. 107, s. 9, providing for the salaries of Collectors and Naval Officers, the necessary expenses of the office are a primary charge upon the gross receipts or fund, and the officer is entitled to the remainder only, after such deduction ; but he is not entitled thereby to receive \$3000, and to charge any deficiency below that sum in the receipts, to the Government.

WRIT of Error to the District Court of Massachusetts. The original suit was debt, brought by the United States upon the official bond of Isaac O. Barnes, as Naval Officer for the collection District of Boston and Charlestown, upon which the plaintiff in error and one Gardner Nevens were sureties, conditioned, that Barnes had duly executed and discharged, and should continue to execute and discharge, all the duties of the said office according to law. The plaintiff in error (the original defendant), after oyer of the bond and condition, pleaded several pleas, upon which issues were joined, and the trial had ; but as none of them are material to the questions discussed upon the writ of error, it is unnecessary to recite them. At the trial, the plaintiff in error prayed the Court to instruct the jury, "that the said Isaac O. Barnes is entitled to retain to his own use all the fees received during each year, that he held the office of naval officer, and for such fraction of a year as he might have held the said office, not exceeding the sum of three thousand dollars for such fraction of a year, exclusive and free from any deduction for clerk hire, or other expenses of his office ;" which instruction the Court refused to give. But the Court did instruct the jury, "that the defendant Barnes was entitled to retain the fees of his office, not exceeding three thousand dollars per year, and a like sum for such fraction of a year as he held the office, provided the fees received during any year or such fraction of a year amounted

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to the sum of three thousand dollars, after deducting therefrom the clerk hire, and other expenses of his office for such year and fraction of a year ;” and thereupon the Judge left the cause to the jury, who found a verdict for the United States. To which refusal to give the instruction so asked, and also the instruction so given, the plaintiff in error filed his bill of exceptions.

Goodrich for the plaintiff in error ; *Dexter*, District Attorney, for the United States.

STORY, J. — The whole question in this case turns upon the true interpretation of the Act of 2d of March, 1799, ch. 9, § 2 ; and of the Act of 7th of May, 1822, ch. 107, § 9. The former act, after providing that certain fees and emoluments shall be paid to collectors and naval officers, to be equally divided between them, proceeds to declare, that the expense of fuel, office rent, and necessary stationery, for the collectors of Salem and Beverly, Boston and Charlestown, &c. &c. shall be paid, three fourths by the said collectors, and the other fourth by the respective naval officers in those districts. So that under this act all the expenses of clerk hire, &c. were to be paid by the collectors and naval officers out of the fees and emoluments of their offices, without any charge whatsoever to the government. By the Act of 1822, ch. 107, § 9, the system was changed ; and it was there provided, “that whenever the emoluments of any collector of the customs of the ports of Boston, New York, &c. (enumerating certain ports), or the emoluments of any naval officer of either of those ports shall exceed three thousand dollars, in any one year, after deducting therefrom the necessary expenses incident to his office in the same year, the excess shall in every such case be paid into the treasury of the United States.” And in order to provide a suitable number of clerks, and no

more, to be employed by the collectors and naval officers, and to limit and fix their compensation, so as to carry into complete effect the new system, it was provided in the same Act (§ 15), "that the secretary of the treasury may, from time to time, limit and fix the number and compensation of the clerks to be employed by any collector, naval officer or surveyor, and may limit and fix the compensation of any deputy of such collector, naval officer, or surveyor." Now, the sole and real question between the parties, in the present case, is, whether, supposing the fees and emoluments of the office are not sufficient to leave three thousand dollars to the naval officer, after deducting the necessary expenses incident to his office (that is, his one fourth of all the expenses stated in the act of 1799, ch. 129, § 2), he is still to receive the three thousand dollars, and the deficiency is to be borne by the government; or whether the necessary expenses of his office are a primary charge upon the gross receipts or fund, and the naval officer is entitled only to so much as remains after such deduction. My opinion is, that the latter is the true interpretation of the 9th section of the Act of 1822, ch. 107. The special object of which is to provide, that the emoluments of the naval officer shall never exceed three thousand dollars, although it may fall far short of it. In truth, the very terms of the section lead almost necessarily to this conclusion, the emoluments are not to exceed the stipulated sum, "after deducting the necessary expenses incident to the office;" so that the expenses are first to be deducted before any distribution or division of the emoluments.

The principal argument urged against this interpretation of the statute is one *ab inconvenienti*, that it places the collectors and naval officers wholly within the power of the secretary of the treasury, as to the amount of their emoluments; for he may fix the number and compensation of clerks so as to take away a large proportion of all the emoluments of these officers

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But if the law has vested this absolute discretion in the secretary of the treasury, I know of no right of Courts of Justice to limit or control it. We are not to presume, that the secretary will misuse or abuse the power. On the contrary, we are bound to presume, that he will exercise a sound and liberal discretion in the matter, so as best to promote the public service, and at the same time to secure to all the officers, affected by it, a just and reasonable compensation for the performance of their official duties.

I am not aware, that the subsequent acts of Congress have in any manner changed or affected the amount of the compensation to be allowed to these officers. All that the subsequent Acts, from 1834 downward, profess to provide, is to prevent any diminution of their emoluments founded upon the reduction of the duties, under the Act of 1832, ch. 224.¹

My judgment, therefore, is that there is no error in the District Judge in refusing the instruction prayed for by the plaintiff in error, or in the instruction, which he absolutely gave to the jury.

The judgment of the District Court is therefore affirmed with costs.

THE BARQUE CHUSAN, — CUSHING, MASTER.

THE Barque Chusan, belonging to Massachusetts, being libelled for materials supplied for repairs done to it in the port of New York ; *It was held*, that a lien therefor attached to the barque, as being a foreign vessel ; but that the nature, extent, and character of such a lien is to be determined by the general maritime law, and not by the local law of any particular State ; and, therefore, that it was not destroyed by the departure of the

¹ See appropriation acts of 27th of June, 1834, ch. 92, § 2 ; of 3d of March, 1835, ch. 30, § 3 ; of 3d of March, 1837, ch. 23, § 2.

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barque from New York, according to the Statute of New York of 1829, vol. 2, p. 493.

In a lien for supplies or repairs to a domestic vessel, the Admiralty Jurisdiction depends upon the local law of the particular State where they are made; but questions of lien upon a foreign vessel are governed by the general maritime law, and not by the local law of any State.

The Statute of New York (Revised Stat. 1829, pt. 3, ch. 8, tit. 8, s. 1, vol. 2, p. 493,) giving a lien to material men for repairs and supplies, &c. is to be considered as remedial in its nature, and not as restrictive; and is perfectly constitutional, as applied to cases of domestic vessels, but not as applied to foreign vessels.

The Courts of the United States, in the exercise of their admiralty and maritime jurisdiction, are exclusively governed by the legislation of Congress, or, in the absence thereof, by the general maritime law; and no State can, by its local legislation, narrow or enlarge such jurisdiction.

The power given by the Constitution of the United States to Congress, to regulate commerce with foreign nations, and among the several States, includes the power to regulate navigation with foreign nations, among the States, and is an exclusive power in Congress, which may be exercised with or without positive regulations.

Congress, by conferring the admiralty and maritime jurisdiction upon the Courts of the United States, have, by implication, adopted the maritime law, inasmuch as such law is the law of the admiralty jurisdiction, until modified by Congress.

The case of *The Nestor* (1 Sumner's R. 73, 74), affirmed.

Where the libellants, being ship-chandlers, furnished materials to the barque Chusan, while in New York, and took therefor the promissory note of one of the owners, and gave a receipt, *it was held*, that the matter was governed by the *lex loci*, by which a note taken for a debt is only conditional payment, until it is duly paid.

By the general maritime law, material men have a threefold remedy for supplies and materials furnished to a foreign ship; 1st, against the vessel; 2d, against the owners; 3d, against the master; and neither remedy is displaced, except upon proof that an exclusive credit was given to one of the parties, or to the vessel.

The lien of material men upon the vessel must be enforced within a reasonable time after the debt is due, or it will not avail against a *bond fide* purchaser, without notice.

Under a bill in Equity, proof is not admissible with respect to matters not alleged in the bill or answer; and, therefore, one of the parties, who claimed to be a purchaser for a valuable consideration, without notice, not having so stated in his answer; *it was held*, that evidence with regard to the fact was not admissible.

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In this case, one of the owners gave a note to the libellants, as payment for their claim, and, subsequently, on settling with the other owner, who was the master of the Chusan, he charged his portion thereof to the master ; and it was held, that the master was not thereby relieved from liability to the libellants, it being a matter between the owners solely.

LIBEL for materials for repairs of the barque Chusan, belonging to the port of Marblehead, in Massachusetts, done in the port of New York. The material facts, set forth in the libel and answer, sufficiently appear in the following statement of facts, agreed to by the parties : — The libellants, who are ship chandlers in New York, in September, 1841, furnished a large amount of copper, as per bill, for the barque Chusan, then lying at the port of New York.

The said vessel was then owned, three quarter parts by N. Broughton, and one quarter part by ——— Cushing, who was also master ; both of whom were inhabitants of Massachusetts.

The copper was purchased for the barque on a credit for six months, and was charged in the books of the libellants to the barque Chusan and owners. A negotiable note signed by Broughton alone, was subsequently taken by the libellants, and a receipt given therefor, as follows :

“ Barque Chusan and owners to J. & G. Ring, Dr. to copper materials, \$1214.45. New York, Sept. 3, 1841. Received from N. Broughton, his note at six months, from Sept. 3d, for the above amount. J. & G. Ring, per J. N. Phillips.”

The note was negotiated by the libellants, and was not in their possession at maturity. Being not paid by Broughton, they took it up as indorsers, and it was offered to be surrendered at the hearing in the Court below.

In 1842, an action at common law was commenced by the libellants, in the Court of Common Pleas, on the said note against the said Broughton and sundry persons summoned as trustees, which suit was ordered to be discontinued before this libel was filed, but is still on the docket of that Court.

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At the time of the purchase of the copper, a part of the vessel belonging to Broughton had been transferred to Bates & Thaxter, two of the claimants, as collateral security, and stood in their names, but they were not in possession, and had no interest in the management and navigation of the vessel. Mack, the other claimant, proves, that the said Cushing, the then other owner, settled an account with Broughton, in which the latter charged the said bill, Cushing being showed said receipt, and acting on the credit of it. Subsequently, Cushing sold his interest in the said vessel to the said Mack, who claimed to be a *boná fide* purchaser, without notice.

The questions intended to be submitted are,

First. Whether, under the circumstances, the taking the note was a waiver of the lien upon the vessel for the supplies created by the general maritime law?

Second. Whether any lien existed after the departure of the vessel from the State of New York?

The case was now argued by *Ring* of New York, for the libellants, and by *F. C. Loring* for the claimants.

The argument for the libellants was as follows:—1. The libellants furnished the materials in September, 1841, on a credit of 6 mos. to the barque Chusan and owners. This is proved by the entries in the books and the account rendered, all showing the barque and owners to be the thing and persons trusted for this debt; by the maritime law, therefore, they had a lien upon the barque in addition to the personal security of the owners. They had an inchoate right to sell the barque for the payment of the debt, at the time of furnishing the supplies, which right became complete, on the termination of the credit. *The General Smith* (4 Wheat.); *Peyroux v. Howard* (7 Peters' R. 341); *The Brig Nestor* (1 Sum. R. 73).

2d. The subsequent taking of the note of one of the own-

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ers, did not discharge the original debt against the *barque and owners*, unless it was expressly agreed to be taken as such, of which, in the present case, there is no pretence; 6 Term, 52; 7 Term, 66; 3 Cranch, 311; 6 Cranch, 264; 7 Peters, 344; 2 Campbell, 515. On this point the law of New York, as the *lex loci*, ought to govern; Story's Conflict of Laws, 266-274; 1 Connecticut R. 409; 1 Wash. C. C. R. 340; and the law of New York is well settled, that a note is neither payment nor a waiver, except it be agreed to be taken as such, 7 Johns. 311; 1 Cowen, 290.

3d. If the note be not a waiver of the libellants' claim against the other owners, it cannot be presumed to be a waiver of their lien upon the ship, which the law has expressly given them for their own protection, in case the personal security of the owners should be insufficient; *Peyroux v. Howard* (7 Peters' R. 341); *The Nestor* (1 Sumner's R. 71). The taking the note is not inconsistent with the full intention on the part of the libellants to retain their lien, and that is the criterion.

4th. Were the note now outstanding, and not surrendered, the case would be different. The law would not *then enforce the lien*, because the party might be compelled to pay twice; *Ramsay v. Allegre* (12 Wheaton, 611); *The Nestor* (1 Sumner's R. 73).

5th. In the case of a lien upon real estate, for the purchase money, it has been expressly held, that the debtor's own note does not extinguish the lien; and the principle, in the present case, is precisely analogous; 15 Vesey, 347; 1 Wash. C. C. R. 191.

6th. There is no pretence of any equities by third persons, purchasing without notice, except as to one quarter owned by Mack. It is, therefore, exactly as if Broughton, whose note the libellants took, claimed protection for his ship, because he

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had not paid his own note, when the law gives the libellants both as security.

7th. As to Mack's one quarter, Cushing is responsible to him. Cushing settled with Broughton in his own wrong. Their receipt on the bill informed him, that he was holden, and he was bound to know, that Broughton's note did not pay the debt; 2 Dow's Cases, 37, 38.

8th. The statute of New York is merely a domestic law, operating upon domestic ships. It does not pretend to, and could not, overrule the jurisdiction of the District Court, as it existed before.

F. C. Loring, for claimants, argued, 1st, that the contract and lien in this case, were to be governed by the local law, by which the lien ceased when the vessel left the State; N. Y. Rev. St. 2 vol. p. 493.

That this law applied both to foreign and domestic vessels; and that it was competent for a State to pass laws regulating the maritime lien on foreign vessels.

2d. That if the lien was to be governed by the general maritime law, it was determined by the giving and receiving of a negotiable note of one of the past owners. *The Brig Nestor* (1 Sumner, 86, 87); *Ramsay v. Allegre* (12 Wheat. 611); *The William Money* (2 Hagg. R. 136).

STORY, J. — This is a libel by material men for materials supplied for the repairs of the barque Chusan. The barque belongs to the port of Marblehead, in Massachusetts, and the materials were supplied for her repairs, while she lay in the port of New York. So that, in the sense of the maritime law, as recognized in this country, it is a case of supplies for a foreign ship lying within a port in a foreign jurisdiction, the different States of these United States being for this purpose

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held foreign to each other. By the general maritime law, a lien attaches upon the foreign ship, under such circumstances; and the nature, extent, and character of that lien is to be determined, not by the local law of the particular State, but by the general principles of the maritime law applicable to the case. This I conceive to be clearly established by the case of *The ship General Smith* (4 Wheat. R. 488); and *Peyroux v. Howard* (7 Peters' R. 324, 341); and it has been fully recognised in this Court in the case of *The Brig Nestor* (1 Sumner's R. 73, 74).

At the threshold of the present case, we are, however, met by the argument, that, by the statute of New York, respecting the lien of material men, and repairers of ships, it is provided, that the lien shall cease, when the ship, for which the supplies are furnished, has left the State. The language of the Statute (Revised Statutes of 1829, pt. 3, ch. 8, tit. 8, § 1, 2 vol. p. 493), is, that whenever a debt amounting to fifty dollars or upwards, shall be contracted by the master, owner, agent, or consignee of any ship or vessel within this State, for either of the following purposes: (1). On account of any work done, or materials or articles furnished in this State for or towards the building, repairing, fitting, furnishing, or equipping such ship or vessel; (2). For such provisions and stores furnished within this State, as may be fit and proper for the use of such vessel, at any time when the same were furnished; (3). On account of the wharfage, and the expenses of keeping such vessel in port, including the expenses incurred in employing vessels to watch her; such debt shall be a lien upon such ship or vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon, except mariners' wages. It is observable, that, in this language, there is no allusion to foreign vessels as contradistinguished from domestic vessels. The object of the provision seems to be to enlarge the maritime law by giving the same remedy in regard to domestic

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vessels, which already existed in relation to foreign vessels. The fair interpretation is, that it is remedial, and not, that it is restrictive. The next section provides for the limitation of the lien to twelve days, when the vessel departs from the port of repairs to any other port of the State, and it is to cease when the vessel leaves the State. This statute is, as I conceive, perfectly constitutional, as applied to cases of repairs of domestic ships, that is, of ships belonging to the ports of that State. And if the present were the case of materials and supplies furnished to a ship belonging to New York, and the lien were sought to be enforced in the Admiralty Courts of the United States, I should have no doubt, that the lien created by the law of that State, and not existing by the general maritime law, must be governed throughout by the law of that State, and that, when the ship left the State, it would cease. But in cases of foreign ships, and the supplies furnished to them, the jurisdiction of the Courts of the United States is governed by the constitution and laws of the United States, and is, in no sense, governed, controlled, or limited by the local legislation of the respective States. The constitution of the United States has declared, that the judicial power of the national government shall extend "to all cases of admiralty and maritime jurisdiction;" and it is not competent for the States, by any local legislation, to enlarge, or limit, or narrow it. In the exercise of this admiralty and maritime jurisdiction, the Courts of the United States are exclusively governed by the legislation of Congress, and in the absence thereof, by the general principles of the maritime law. The States have no right to prescribe the rules, by which the Courts of the United States shall act, nor the jurisprudence which they shall administer. If any other doctrine were established, it would amount to a complete surrender of the jurisdiction of the Courts of the United States to the fluctuating policy and legislation of the States. If the latter have a

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right to prescribe any rule, they have a right to prescribe all rules, to limit, control, or bar suits in the national Courts. Such a doctrine has never been supported, nor has it for a moment been supposed to exist, at least, as far as I have any knowledge, either by any State Court, or national Court, within the whole Union. For myself, I can only say, that, during the whole of my judicial life, I have never, up to the present hour, heard a single doubt breathed upon the subject. The distinction between foreign ships and domestic ships, as to this very matter of lien, was stated with great precision and accuracy by Mr. Justice Thompson in *Peyroux v. Howard* (7 Peters' R. 341), where he said; "In the case of *The General Smith* (4 Wheat. R. 438), it is decided, that the jurisdiction of the admiralty in such cases, where the repairs are upon a domestic vessel, depends upon the local law of the State. Where the repairs have been made, or necessities supplied to a foreign ship, or to a ship in the ports of a State to which she does not belong, the general maritime law gives a lien on the ship, as security, and the party may maintain a suit in the Admiralty to enforce his right. But as to repairs and necessities in the port or State, to which the ship belongs, the case is governed altogether by the local law of the State, and no lien is implied, unless it is recognised by that law. But if the local law gives the lien, it may be enforced in the Admiralty." Language of a similar import was used in the case of *The General Smith* (4 Wheat. R. 443). Now, it is impossible to read this language, and not to perceive, that the Court never entertained the slightest notion, that the question of lien for repairs and supplies of a foreign ship did depend, or could depend, upon the local law of a State. It was treated throughout as governed solely by the maritime law. The very article of the code of Louisiana (article 2748), on which the case of *Peyroux v. Howard* (7 Peters' R. 34) turned, makes no distinction between foreign and domestic ships, as to the lien or

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privilege for repairs ; and yet, as we have just seen, the Court considered the distinction as clear between the application of that article to a domestic ship, and its application to a foreign ship, in the matter of the lien.

Suppose a State legislature should declare that there should, in future, be no lien of seamen for their wages, on any ship foreign or domestic, or no lien for salvage on any ship foreign or domestic ; and no lien for any bottomry bond on a ship foreign or domestic ; will it be pretended, that such a law would be obligatory upon the Courts of the United States in the exercise of admiralty and maritime jurisdiction ? If it would be, a more forcible and complete device to dry up and extinguish the jurisdiction of the Courts of the United States in Admiralty cases, could scarcely be imagined. The truth is, that the admiralty and maritime jurisdiction of the Courts of the United States, given by the constitution, covers not merely the cognizance of the case, but the jurisprudence and principles, by which it is to be administered. It covers the whole maritime law applicable to the case in judgment, without the slightest dependence upon or connexion with the local jurisprudence of the State on the same subject. The subject matter of admiralty and maritime law is withdrawn from State legislation, and belongs exclusively to the national government and its proper functionaries.

Besides ; by the constitution of the United States, Congress has the power to regulate commerce with foreign nations, and among the several States. The power to regulate commerce includes the power to regulate navigation with foreign nations and among the States ; and it is an exclusive power in Congress. This I conceive has been firmly established by the Supreme Court of the United States ;¹ and the doctrine stands, as I conceive, upon grounds, which cannot be shaken, without

¹ See *Gibbens v. Ogden* (9 Wheat. R. 193 to 196).

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endangering the interests of the whole Union, if not the very existence of the constitution as a frame of government for the professed objects and purposes, which it was intended to accomplish. Now, there cannot be a doubt, that the prescribing of rules for the shipping of seamen, and the navigation of vessels engaged in foreign trade, or trade between the States, is a regulation of commerce. In what respect does the exercise of a power to regulate, control, or extinguish the liens given by the maritime law for material men upon foreign vessels, differ from the power to regulate the shipping of seamen, or the navigation of foreign vessels? Each is a regulation of foreign commerce, or commerce among the States. Each includes the assumption of a power to act upon the subject-matter as one of concurrent jurisdiction, instead of belonging exclusively to Congress. It would not, I presume, be doubted, that Congress might, by an express act, adopt the whole maritime law upon this subject; and if it had so done, no State could rightfully interfere to control, or limit, or restrict it. It seems to me, since the maritime law constitutes the law of the Admiralty and maritime jurisdiction of the United States, until modified by Congress, that Congress, by conferring this jurisdiction upon its Courts, has, by implication, adopted that law as a regulation of commerce essential to its proper exercise.

Perhaps it will be suggested, that if Congress had passed an act upon this subject, it would be of paramount authority, and suspend or control State legislation upon the same subject; but that until Congress shall pass such an act, the States have full authority to act upon it. This I utterly deny. If the power to regulate foreign and inter-State commerce be, as I conceive it to be, exclusive in Congress, all State interference therewith is unconstitutional and void. Congress, having power to regulate the whole subject, regulates it as much by

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what it leaves without any positive regulations, as by what it expressly provides for. The will of Congress is equally expressed in both cases. It cannot be, that a State has a right to step in, and, by way of complement, fill up by its own legislation, what is not actually occupied by that of Congress. Such was the doctrine maintained by the Supreme Court in *Houston v. Moore* (5 Wheat. R. 1, 21, 22), *Gibbons v. Ogden* (9 Wheat. R. 1, 196 to 222), and *Holmes v. Jennison* (14 Peters' R. 540, 569, 574 to 579).

I have thought it right to say thus much upon the general question of the operation of the statute of the State of New York. I ought to add, that I entertain not the slightest doubt, that that statute was never intended to be applied to cases of foreign ships, or the repairs thereof, but was designed to be auxiliary to the maritime law, and to give it an extended application to domestic ships, from motives of public policy and general convenience. New York is the last State in the Union, which, in point of interest, could entertain the purpose of crippling the national authority over the regulation of commerce, or of interfering with the great principles of maritime law, upon liens for repairs and other kindred purposes. From what has been already stated, the first point relied on in the defence, — that the lien, if any was, under the circumstances, created by the repairs, ceased with the departure of the ship from the ports of the State, is over-ruled by the Court as incapable of being maintained as a bar to the suit.

We are next met by the question, whether, in the first place, any lien was created upon the brig for the repairs; and in the next place, if created, whether it was not waived or extinguished by the note of Broughton. The argument, that no lien was created, because of the credit given for the repairs, is not now relied upon, because it is completely disposed of by the case of *The Nestor* (1 Sumner's R. 73, 74), in this Court; and to the considerations there stated, and the

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decision there made, my judgment still adheres with unabated confidence.

Then, as to the note, it is a contract governed altogether by the law of New York (since it is not a maritime contract), at least, to the extent of disposing of the present objection. By the law of New York, as by the law of England, and, indeed, as far as I know, by the law of all the States of the Union, except Massachusetts and Maine, which are governed by a somewhat modified doctrine, a note taken in payment of a debt is ordinarily but a conditional payment thereof; that is, it is an absolute payment only when duly paid.¹ The presumption, *prima facie*, in New York is, that a note taken for a debt is a conditional payment only; but this presumption may be rebutted by proof, that it was taken as an absolute payment. On the contrary, in Massachusetts and Maine the presumption is, *prima facie*, that a note taken for a debt is an absolute payment, but this presumption may be rebutted by proof, that it was intended as a conditional payment only.

Now, in the present case, there are no circumstances to repel the ordinary presumption, that the note taken in this case was taken otherwise than according to the *lex loci contractus*. The ship was not a domestic, but, in the sense of the law, a foreign ship; the owners were strangers, belonging to another State. The ship was, in New York, subject to a general lien for repairs. Under such circumstances, the natural presumption would be, that exclusive personal credit was not given to the owners of the ship, and *a fortiori* not to one of the owners. The very credit allowed might be naturally and conveniently allowed upon the ground, that the ship itself was a collateral security for the debt, from the lien of the maritime law ad-

¹ See *Schermerhorn v. Loring* (7 John, R. 311, and the cases cited in the reporter's note to the 3d edit. 1832); *Muldon v. Whillock* (1 Cowen, R. 290).

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hering to it. Besides, upon the very face of the account, there is evidence, that credit was originally given to the ship for the supplies and materials. The language of the account is: "Bark Chusan and owners bought of John and George Ring." So that this repels the notion, than any mere personal responsibility of the owners was exclusively relied on or taken. We all know, that, by the general principles of the maritime law, material-men have a three-fold remedy for supplies and materials furnished for a foreign ship. First, the ship itself; secondly, the owners; and thirdly, the master; and neither of these remedies is displaced, except by conclusive proof, that an exclusive credit has been, in fact, given to one or more of the parties so liable, or to the ship itself. I need not quote authorities in support of this doctrine. It was fully recognised by Lord Mansfield in *Rich v. Cœ* (Cowp. R. 636), and *Farmer v. Davis* (1 Term Rep. 109); and this is regularly true in all cases where the general maritime law governs, whatever may be the case, where the municipal jurisprudence inculcates a more restricted rule.¹ It is certainly the well established doctrine in America, as the cases already referred to abundantly show.

The lien, however, which is given by the maritime law on the ship, although it is, or may be treated as, a permanent or abiding lien upon the ship, until the debt is paid, as between the original owners and the material-men, and their personal representatives, is liable to a very different consideration, when the ship has passed into the hands of a *bonâ fide* purchaser, for a valuable consideration, without notice of the lien. In respect to such a purchaser, the lien must be enforced within a reasonable time after the debt is due, and the credit, if any, has expired; otherwise a Court of Admiralty will protect him, as a Court of Equity would do, against the claim as

¹ See Abbott on Shipp. pt. 2, ch. 3, § 2, § 3, § 10, edit. 1829.

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stale, and inequitable. What will constitute a reasonable time must depend upon the circumstances of each particular case, and is not a point susceptible of any definite or universal formulary of interpretation.

In the present case, no ground of this sort is set up as matter of defence in the answer ; and, therefore, I am bound to presume, that none exists ; for certainly it is not admissible, without being set up in the answer ; for the cause must be decided *secundum allegata et probata*. Proof is not enough without a suitable allegation to allow its introduction, as allegation would not be enough without proof.

In respect to Messrs. Bates & Co., it is clear, that they do not stand in the predicament of *bonâ fide* purchasers for a valuable consideration, without notice. Their title is as mortgagees only under Broughton, taking the property as collateral security for a debt due to them by Broughton ; and with the admitted fact, that they never took possession of the ship, or interfered with her management, and that the mortgage was antecedent to the supplies of the libellants to repair the ship. Under such circumstances, they were benefited by the supplies, and must be deemed, by their conduct, to admit the right of Broughton to contract as absolute owner for them and to bind the ship by a lien ; and this upon the plain maxim, *qui sentit commodum, sentire debet et onus*.

In respect to Cushing's one quarter part of the ship, he paid his proportion of the amount to Broughton ; but he was also master of the ship, and if the receipt on the account was shown him, that receipt would also prove, that the account had not been paid by Broughton, but that the latter had given his note only therefor ; and under such circumstances he was bound to know that, by law, the note was no discharge of the debt, unless it was duly paid. If, on the other hand, he never saw the account or the receipt thereon, but he trusted entirely to the affirmation of Broughton, that it was paid ; then his

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confidence in Broughton, although it might have misled him, is not to prejudice the libellants, in their claim. In either view, therefore, it is plain, that the taking of the note would not discharge him personally, or his share of the ship from the maritime law. The case falls within the principle acted upon in *Stewart v. Hall* (2 Dow, R. 29), and *Wyatt v. The Marquis of Hertford* (3 East, R. 147), although the circumstances of those cases were not identical with those of the present. The case of *Muldon v. Whitlock* (1 Cowen R. 290), goes the full length of the doctrine; and perhaps presses it somewhat further.¹

In respect to Mack, who is the purchaser under Cushing, of his share of the ship, there is nothing in the answer suggesting when he became the purchaser, or under what circumstances, or whether he had notice of the fact of repairs, and the giving of the note by Broughton, and the settlement between the latter and Cushing. This was certainly material to have been stated; and the defect is not entirely supplied by the statement of facts. It is only there stated, that Mack became a purchaser from Cushing, and "claims to be a *bonâ fide* purchaser, without notice." When he purchased does not appear. Now, there is nothing in the answer suggesting (as has already been stated) that the libel was not filed within a reasonable time after the credit had expired, so as to entitle the libellants to enforce the lien. And under such circumstances, the Court must presume, that it was filed within a reasonable time. If Mack purchased before the filing, with knowledge of all the facts, he must stand in the same predicament with Cushing. If he purchased without such knowledge, and yet the libel was filed within a reasonable time, he must take his purchase *cum onere*, and cannot be exempted from the lien. Of course, if he purchased after the libel was

¹ See Story on Agency, § 433, § 434.

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filed, he is affected with all the Equities between the libellants and Cushing.

But as between Broughton and Mack, the latter would have a clear right to have the whole repairs charged upon Broughton's three quarters of the ship, to the exoneration of Cushing's one quarter; and the only open question is, whether, under the circumstances of the present case, Bates & Co. are not affected with the same Equities as Broughton. I incline to think, that they are; but if the parties desire to be heard upon that point, I will leave that part of the case open for argument.

My judgment upon the merits is, that the libellants have a complete subsisting lien upon the ship for the amount of their account; and that it is to be enforced by a decree.

The decree of the District Court (which is understood to have been given upon the mere footing of the authority of the case of *The Nestor* (1 Sumner's R. 73, 74), is therefore reversed, and a decree will be entered, according to the opinion which I have now delivered, for the amount of the libellants' account, with costs.

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WHERE a ship is abandoned for a total loss, the Master cannot sell the cargo, and invest the proceeds in other goods, unless he be justified by necessity, or by a high degree of expediency. But if he do make such a sale and investment, when they are unnecessary or inexpedient, yet, if the parties interested receive the property, without objection, and adopt the acts of the Master, they must bear all proper charges thereupon. If, however, they receive the property, reserving their rights and waiving no objections, and it do not yield a profit beyond the fair value of the property shipped, they are liable for no charges upon it; but if it do yield

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such a profit, and the Master act without fraud, he is entitled to be paid a reasonable compensation and his reasonable expenses, not exceeding such profit.

Assumpsit on a policy of insurance. A verdict being found for the plaintiff, in this case, it was, pursuant to the agreement of the parties, referred to auditors, to ascertain the amount of the loss for which the underwriters were liable, deducting the salvage. In order to understand the case, it is proper to state, that the ship *Boston*, after the surveys made at the Bay of Islands, in New Zealand, was condemned, because the necessary repairs would amount to more than the ship would be worth after she was repaired. She was accordingly sold at the Bay of Islands by Hemstead, the master. The master remained there for four months, to take care of the property, as was his duty, and sold part of the cargo of oil there, and shipped the remainder of the cargo on board of the ship *Henry Tuke*, bound to New York, via. Rio Janeiro. By the bill of lading the shipment was for New London, with the privilege to discharge the same at Rio. The master embarked with the cargo on board the *Henry Tuke*, which duly arrived at Rio; he there caused the oil to be unladen and sold, and the proceeds invested in coffee, which was laden on board the *Henry Tuke* and carried to New York, and there sold with the consent of the underwriters. The master came with the shipment in the ship to New York. The coffee sustained some damage during the voyage.

The report of the auditors having been returned to the Court, objections were taken to certain allowances made to the master, which will fully appear in the argument of the counsel for the defendants.

Colby and *Coffin* for the defendants, argued as follows: — In this case it appears, that the master of the *Boston* shipped the oil on board the ship *Henry Tuke* for New York; that the

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master came as passenger; that the ship touched at Rio Janeiro, where the master of the Boston landed a portion of the oil, invested the proceeds in coffee, which he shipped on board the said Henry Tuke; that the coffee was damaged on the passage, was finally landed at New York, and sold.

On this state of facts, the underwriters have been charged, in the adjustment, with the following items, viz.:

“ Passage of Capt. Hempstead in Henry Tuke to	
New York,	\$150
Expense and board paid at Rio Janeiro while un-	
loading oil and loading coffee,	190
Capt. Hempstead’s board and services, 17–348,	365
Sale of oil at Rio Janeiro.	
Invoice as invested in coffee.	
Net proceeds of coffee, &c.	
Freight of oil, 10 cents per gal. 5 per cent. primage.	
Duties.	
Conference and Trapiche.	
Brokerage, $\frac{1}{2}$ per cent.	
Gauging.	
Commissions, 5 per cent.	
Cost of 946 bags coffee invested as per invoice.	
Commissions, Joseph Lawrence, $2\frac{1}{2}$ per cent.	
Survey on damaged coffee.	
Premium on policy of insurance on oil from Bay	
of Islands.	
Benj. Hempstead, for services at Rio, disposing of	
oil and buying coffee.”	

These items are arranged under different heads, in the adjustment, but they are presented in this order for the purpose of presenting our objection.

We do not suppose, that it is within the range of a master’s

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authority, after having shipped his cargo home, to speculate upon it at any port he may enter on the passage, and that the underwriters shall pay all the expenses of such speculation, in the way of duties, commissions, services, &c. and take upon themselves thereby the fluctuations of the market. On this principle, he might have exchanged the coffee for molasses, and that for lumber, and gone to every port this side of Cape Horn, to trade and speculate for the underwriters.

The following authorities were then cited: — *Suydam v. Marine Insurance Company* (2 John's. R. 143); 2 Phillips on Insurance, 2d edition, pp. 216, 217, 218, 219, 220, and 222.

The Captain having chartered the vessel to bring the cargo to the United States, had no authority to sell it at Rio Janeiro; and although this fact may not affect the rights of the assured, nevertheless, he cannot, by his own unauthorized and unwarranted act, entitle himself to the compensation, to which, under other circumstances, he would have been entitled. His charges of commissions, expenses, &c. arising from this sale at Rio, are, on that account, objected to. The charges of his passage and *time* (the latter especially) are objectionable. By the terms of his contract with the owners, he was bound to give his time to the transportation of the cargo. And his lay is payment for the time included in making passages. There is no reason, therefore, why he should, because of the total loss, receive pay for his services beyond that, which was contemplated by his *share* or *lay*.

The premium paid by the owners, for a re-insurance of property, which they now say belonged to the defendants, by force of the abandonment, would seem not only to be unjust, but unreasonable.

Choate and *Crowninshield* for the plaintiff, argued as follows: — In this case a verdict was rendered in favor of the plaintiff for a round sum, and liberty was given to the defend-

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ants to have the amount made up by an auditor. The loss has been made up by Messrs Hales & Welbasky, insurance brokers in the city of Boston, which statement the parties take as a basis on which to present certain objections to the Court, instead of an auditor's report.

The defendants' counsel have filed certain objections or exceptions to the "statement" thus made up, which objections we will shortly consider.

1. It is not true, in fact, as stated in the beginning of the defendants' statement of objections, that the master shipped the oil for New York. By turning to the first bill of lading, annexed to the master's deposition (B. B. Hempstead's), it will be seen that the oil was shipped for *New London*, "with privilege to discharge at Rio Janeiro."

The true statement of the matter is this. Owing to damage, which the ship had sustained by perils of the seas, as the jury have now found, the ship was condemned and sold at the Bay of Islands. The whaling voyage, not then completed, was broken up. The master waited a period of about four months, taking care of and preserving the property, and then shipped the cargo home by the first opportunity; and as the ship must, on her voyage to the United States, pass directly by Rio Janeiro; and as that is usually a good market for oil, he, in pursuance of a right reserved in his bill of lading, stopped there and sold his oil, and invested the proceeds in coffee, and together with the whalebone, brought it to New York, where it was sold.

The defendants' counsel raise two principal objections, which we will consider in the following order:

1st. That the master had no right to sell his oil at Rio and invest the proceeds in coffee, on the underwriters' account.

2d. They object to compensating the master for his time and services, spent and rendered in preserving the property saved, and in shipping and selling such portion thereof as was

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shipped and sold under his direction and responsibility ; for expenses incurred by him while in that service ; for board at the Bay of Islands, Rio, &c. and for his passages.

As to the first objection, it will be remembered, that the owner promptly *abandoned* the property assured to the underwriter, the voyage having been broken up, so that the master was the agent of the underwriter, from the time of the loss ; and all the acts done by him in regard to the shipping the cargo, the salvage of the ship, &c. were for account, not of the owner, but of the underwriter. There is no proof or suggestion, that the master has not acted with the most perfect good faith, or that the course pursued was not perfectly prudent and proper under the circumstances. He had no orders or directions from the plaintiff how to act, but in a case of loss, he acted upon his own judgment for the best interests of all concerned. He considered that as the best mode of re-mitting the property.

The citations from 2 Johns. and 2 Phillips on Insurance, are entirely inapplicable. Those cases refer to an adjustment of a *partial* loss, where there was no abandonment. The case of *Pacific Insurance Company v. Catlett* (4 Wend. 75) ; 1 Wend. 561 ; 1 Paine, 619 ; (see 2 Phillips on Insurance, new edition, p. 343), is like the present, and seems decisive. See also 2 Phillips on Insurance, second edition, p. 439, *et seq.*

2d. As to the master's compensation. When the ship was condemned and sold, the mates and crew might lawfully leave her and go about their business ; but the master was bound to remain and take care of the property for the benefit of whomsoever it might concern. Now here no objection is made as to the *amount* charged by the master for his expenses and services, that the *price* is unreasonable, but that he has no such claim. If the law devolves the duty on the master, it will see him compensated. If he became the agent of the underwriter, then the underwriter must pay him for his services as

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agent. The defendants contend, that for waiting for the space of four months at the Bay of Islands, for his responsibility in shipping the cargo, selling the vessel, and for his accompanying the cargo to Rio, and his responsibility and services in selling the oil and buying coffee, he is not to be paid! They speak of his "unauthorized and unwarranted act," in selling oil at Rio. But is there any proof that the master did not act *bonâ fide*? They contend, that his *lay* as master compensates him. We submit, that his *lay* compensates him for his duty on the whaling voyage to the same extent, that it does the crew, but no further; and that, from the time of the loss, he assumes a new duty, and is entitled to a new compensation. He is no longer acting for his own advantage. Indeed, the usage to compensate a master under such circumstances, has been too well settled to be now questioned. For his mere passage home, there may be a question whether the underwriters be liable; but we submit, that this is not that case. He went in the same ship as that in which the cargo was shipped; it was in his charge, and he was to decide at Rio whether to sell there or not. He was in the service of the underwriters and acting for them, and they should pay his expenses. He might very likely have procured employment, or another voyage, at the Bay of Islands, but he was not at liberty to seek it.

The freight of the oil, merchants' commissions, duties, and general charges and expenses at Rio, are a proper charge on the coffee purchased and oil sold, just as much as the same charges at home would be. It was the property of the underwriters, not ours. The salvage came to our hands charged with these expenses; we had no power to resist them. We account only for what we receive. If the underwriters are dissatisfied with the charges, they must look elsewhere for redress. The master first deducts his charges; we cannot prevent it. So does the commission merchant.

In the next place, as to Mr. Lawrence's commission. He

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went to New York by the consent and authority of the defendants, and took charge of the cargo on its arrival there, and attended to the sale of it; of course, he is entitled to the usual commission. This objection, however, does not seem to be insisted on.

There is *one* charge, however, about which we think, that the objection is perhaps well taken. When Mr. Lawrence heard of the loss, finding there was to be a dispute, *ex majori cautela*, he insured the salvage home, "for whom it might concern," and he charges that premium. Now, as the salvage was, by the abandonment, at the risk of the defendants, perhaps he had no right to charge them with a premium of insurance on that.

STORY, J. — In the present case, the abandonment having been made in due season for a total loss by the perils of the seas, and a verdict having been found in favor of the plaintiff for a total loss, it is clear, that from the time to which the abandonment relates, that is, from the time of the condemnation and sale of the *Boston*, the master became, and was the agent of the underwriters. It follows, that all his acts, whether rightful or wrongful, in the shipment and sale of the oil, and in the investment of the proceeds in coffee, are to be treated as acts of the agent of the underwriters, and not of the assured, and that the underwriters are solely responsible therefor. Still, however, as, in the present case, it is thought desirable by all the parties to have the questions raised finally disposed of, in order to prevent future litigation or controversy, I have no objection to state my own view of them. In the first place, I deem it perfectly clear, that Capt. Hempstead's necessary expenses at the Bay of Islands, in taking care of the property insured while there, and until the shipment of the oil in the *Henry Tuke*, together with a reasonable compensation for his services, are to be a charge upon the

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underwriters. If his accompanying the shipment of the oil was a reasonable and prudent act for the benefit of the underwriters, and if the oil had been carried to New York, I have no doubt, that his passage to New York in the Henry Tuke ought also to be a charge upon the underwriters. The difficulty, that arises, is from the sale of the oil at Rio Janeiro, and the investment of the proceeds in coffee there. If that sale was a highly reasonable and prudent act, such as the master ought, in pursuance of his duty, to have adopted for the benefit of his principals (the underwriters), then his passages to Rio and from thence to New York, in the Henry Tuke, ought also to be a charge upon the underwriters, as well as his expenses at Rio Janeiro, and also a reasonable commission for his services in the sale and investment of the proceeds in the coffee.

Now, certainly, a master of a ship, in a case circumstanced like the present, has not a right, as a matter of course, to dispose of the property confided to his care, and to invest the proceeds thereof in other goods upon speculation. There must be either a necessity for the sale, or, at least, it must, with reference to the voyage and the nature of the property, be in a very high degree expedient; otherwise it will be treated as a tortious conversion. If, on the other hand, the master does make a sale, without such necessity or high expediency, and it turns out to be advantageous to the parties interested, and they adopt the acts of the master, and receive the property without reserve or objection, that will amount to a ratification, and they must then take the property or its proceeds *cum onere*. If, on the other hand, they receive the property, or its proceeds, reserving all their rights, and waiving no objections, then they are entitled to receive the proceeds, without any charges upon them, if the proceeds do not yield a profit to them beyond the fair value of the property shipped, and so improperly converted, as it would have been on its ar-

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rival at the original port of destination. But if a profit ultra such value has come to the hands of the underwriters, by reason of the new investment, then I think, that if the master has acted without fraud, and under a mere mistake of judgment, he ought to be entitled, out of those profits, to receive his reasonable expenses, and also a reasonable compensation for his services, not exceeding those profits. Now, there is nothing in the facts and circumstances presented by the report in the present case to enable me to pass any judgment upon these matters. They must, if they furnish grounds for controversy between the parties, be specially ascertained by the auditors, and with their judgment thereon be reported to the Court.

These remarks, I believe, are sufficient to furnish an answer to all the objections and suggestions made at the argument, except those, which respect Mr. Lawrence's commissions, and his claim for the premium upon the new policy on the oil from the Bay of Islands. The latter claim is surrendered by his counsel, and is clearly unmaintainable. The former is silently abandoned by the counsel for the defendants; and, indeed, as the sale was made by Mr. Lawrence with the consent of the underwriters, it is clearly a charge, which ought to be borne by them.

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MOSES SANBORN, JOSEPH L. CILLEY, AND JAMES BELL

v.

AMASA STETSON.

THE plaintiffs brought an action against the defendant for fraudulent misrepresentations in a sale of lands by the defendant to the plaintiffs. It appeared, that, between the time of the sale in 1835 and the time when this suit was brought in 1841, the plaintiffs had paid the purchase-money, without objection; that they had sold great quantities of the land, and that the value of the lands had greatly diminished. The defendant did not pretend to be well acquainted with the township, or to have explored it, but expressly told the plaintiff's agent, Chamberlain, to examine for himself. Chamberlain did make an examination, and gave his estimate to the plaintiffs, being 51,000,000 of feet of timber. At the request of the plaintiffs, another exploration was made in 1836 of the whole lands, by Messrs. Farnham, who estimated the pine timber at 18,480,000 feet, and the hemlock at 27,704,000 feet. But the plaintiffs did not apply to rescind the contract before this suit.

The first count charged a misrepresentation, that the plaintiff had not cut, nor permitted any one to cut, any pine timber from the land; but *It was held*, that this representation was not proved to be fraudulent, or material under the circumstances.

The second count charged, that the plaintiff showed tracts, as samples of the whole land, which were of superior value, and had more timber on them than the rest. But this count was not sustained by the evidence.

The third count charged a fraudulent exhibition of a dotted map as a true plan of the pine timber on the land. But it appeared that the map only represented the position of the timber on the lot, and not its quantity; and as the *quantity* was the only material inquiry, and no fraudulent intent was proved, this count was not sustained.

The fourth count charged a fraudulent representation, that the lots contained 50,000,000 of feet of timber, whereas they only contained about 20,000,000; but it appeared, that this representation was made by Chamberlain, the plaintiff's agent, and was merely his estimate, and no fraudulent intent was proved.

The fifth count charged false representations as to the quantity of timber on certain lots. But it appeared, that these representations were made by the agents of the plaintiff, and were his estimate.

On the whole case, *It was held*, that the plaintiffs were not entitled to recover.

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This action was brought only two days before the statute of limitations would have barred the suit; but *It was held*, that although in a bill in Equity for relief, or to rescind the contract, the staleness of the claim, and the want of diligence of the plaintiffs, and the lapse of time, would have rendered the claim unmaintainable; yet that, at law, the plaintiffs were not barred thereby.

THIS was an action on the case for fraudulent representations, alleged to be made by the defendant to the plaintiffs upon the sale of certain lots of land in the town of Carmel, in Maine, owned by the defendant, and sold for the sum of \$61,903.37. The cause came on to be tried by a jury at the October Term of the Circuit Court, 1842; but, in consequence of the illness of Mr. Justice STORY, it was taken from the jury before the trial was finished. It was afterwards, by the agreement of the parties, argued at this term to the Court, without any jury, and the Court were to render such a judgment, as it should deem right upon all the proofs in the cause, and the law arising thereon.

The cause was accordingly argued at great length upon the law and the facts, by *Charles Sumner* and *Joseph Bell*, for the plaintiffs, and by *J. Rogers* and *R. Choate*, for the defendant.

Mr. Justice STORY afterwards delivered the result of his opinion orally, to the following effect:

This is an action on the case for fraudulent representations in the sale of lands by the defendant to the plaintiffs. The sale was made on 3d July, 1835, of lots 3, 5, 8, 11, 13, 15; of gores of lots 27, 17, 18, 21, 22, 37, 38; of the west half of lots 42, 47, 48, 54, 58 (excepting 10 acres); of lots 59, 60 (excepting 100 acres), 62, 65, 66, 68 and 70, in the township of Carmel, containing in whole, 7282 $\frac{1}{4}$ acres. The lots were sold for \$61,903.37, paid and secured to be paid to the defendant.

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There are various counts in the declaration : —

(1). For a false representation, that plaintiff had not cut any pine timber from said lands, nor given permission that any should be cut therefrom.

(2). For a fraudulent showing by the plaintiff, on the sale of the tracts, of some of superior value and more timber, as samples of the whole, and thereby affirming, that all were of equal value and had an equal quantity of timber.

(3). For a fraudulent exhibition of a map on sale as a true plan, and as a representation of the pine timber thereon, and thereby affirming, that the tracts were covered with pine timber on the parts and to the extent covered by the plan.

(4). For a fraudulent representation, that the pine timber on the lots was about 50 millions of feet, whereas the quantity did not exceed 20 millions of feet.

(5). For a false representation, that there were on lots 58, 59, 60, 47 and 48, about 12 millions of feet of pine timber ; on 11, about 3 millions of feet ; on 62, about 2 millions of feet ; on 70, about 2 millions of feet ; whereas there was not on 58, 59, 60, 47 and 48, over 4 millions of feet ; on 62, not over 1 million of feet ; on 70, not over 800,000 feet.

(6). The sixth count embodies the four first, and contains no new charges.

The whole case, therefore, turns upon allegations of positive fraud, and positive misrepresentation, with a fraudulent intent. The deed of the land was made to the plaintiffs on 3d of July, 1835. The suit was brought on July 1st, 1841, two days only before the statute of limitations would operate upon the case. This is not, *per se*, an objection to the suit. But it must operate in point of evidence upon the case ; for lapse of time necessarily renders all testimony more obscure, and less easy of precise ascertainment, from the *frailness* of memory, from subsequent changes of opinion, or from other circumstances.

In the intermediate time between the time of the sale and that of the suit, the defendants, without objection, paid large amounts of the purchase money, and took up their notes at maturity. Indeed, the whole purchase money, amounting to \$61,903.37, has been paid, and the last payment and discharge of the mortgage were on the 18th of June, 1839. The plaintiffs, between the 1st of July, 1836, and the 1st of July, 1841, sold large quantities of the land, and of timber on the land, to different purchasers. And, according to their own statement, on the 1st of July, 1841 (the day of the commencement of the suit), they had sold all the land except 4387 $\frac{1}{4}$ acres, on which they estimate, that there was pine timber to the amount of 1,742,000 feet.

These facts are exceedingly important. The plaintiffs had, during these five years, ample opportunity to explore the lands, to ascertain the amount of the timber thereon, and to obtain a full knowledge of all the facts, relative to the asserted fraud, upon the land. They might have refused to pay the purchase money upon the ground of fraud ; and if there was any fraud, they might in Equity, if not at law, have rescinded the contract.

Why did they pay the purchase money without objection ? Why did they continue to sell parcels of the land from July, 1836, to July, 1841, if the fraud was either known or suspected by them ? Are not these facts strong evidence of their acquiescence in the *bona fides* of the sale, if not of their satisfaction with the bargain ?

It is also material to consider certain other facts. The value of the lands has been greatly diminished, and the price has greatly fallen, between 1835 and 1841. The price in 1835 may have been, and probably was, at an inflated and exorbitant rate. It may now be greatly below its true value, from general causes of depression, as it probably was at some of the intermediate periods between 1835 and 1841. If this

were a bill in Equity to rescind the contract, or for relief, it would clearly be unmaintainable, upon the ground of the lapse of time, and staleness of the claim, and the want of diligence in the plaintiffs, with the means of knowledge of all the facts in their power, *recentis factis*. Upon this point, it is fit to refer to the case of *Vigers v. Pike* (8 Clarke & Finelly, R. 650). But at law the case is different. The plaintiffs have a right to stand upon their legal rights, and are not barred if a case of fraud be made out. But then the *onus probandi* is on the plaintiffs. Fraud is not presumed. It must at law be clearly and fully established. Suspicion is not enough. Doubtful circumstances are not enough. The balance of the testimony is not to be nicely weighed.

In order, then, to establish the plaintiffs' case, it is necessary to show, (1). That fraud was intended by the defendant. (2). That it was *consummated*. (3). The purchase must be shown to have been upon the faith of representations of the defendant, and not solely upon statements of their agent, Chamberlain, or of other persons. If the defendant attempted a fraud, and the plaintiffs purchased, relying upon their own judgment, or that of Chamberlain, the suit is not maintainable.

Some things are clear. (1). The defendant did not pretend to be well acquainted with the township, or to have explored it. (2). He expressly told the plaintiffs' agent (Chamberlain), to examine and explore for himself. That agent intended to be a co-purchaser, as he himself has stated. (3). The plaintiffs' agent (Chamberlain), did explore and examine the lands for himself. (4). It is admitted, that the plaintiffs' agent did communicate his estimate to the plaintiffs (at 51 millions of feet of timber), and that he was then perfectly satisfied with his own exploration, and with the purchase, as a good bargain. His letter of the 24th of June, 1835, shows this. Nay, the plaintiffs' agent continued to express a favorable opinion of the purchase for years afterwards, upon fuller

examination ; and, as some of the testimony states, even down to 1841.

Another important fact is, that an exploration of the whole lands was made by the Messrs. Farnham, in March and April, 1836, *for and at the request of the plaintiffs*. Their estimate made to the plaintiffs gave the *pine timber* at 18,480,000 feet only. They also estimated the *hemlock* at 27,704,000 feet. Now, this estimate must be taken to have been adopted by the plaintiffs as a true and fair one in 1836. Indeed, the fourth count of the declaration seems to proceed upon the estimate of pine timber on the land as not exceeding 20 millions of feet. Why, then, did not the plaintiffs, in 1836, apply to rescind the contract, or repudiate the purchase, or refuse to pay their notes, or give notice to the defendant ? They knew the full exigency of their case at that time. There is no pretence of any new information, or of any new facts brought to their knowledge, as to the original statements of the defendant, since that period. If any fraud existed, it was then known to them. They were put upon inquiry. They did not then choose to act upon the ground of fraud. Is not this very strong evidence to show, that they did not then believe in any fraud ? Or, that there had been any misrepresentation by the defendant ? Does it not prove, that they purchased upon the exploration of their own agent, and not upon the supposed statements of the defendant ? Or, that they meant to waive all future inquiries into the subject, because they had sustained no damages ? These are general preliminary considerations, applicable in a great measure to the whole case, in all its various aspects.

Let us now proceed to consider the particular counts in the declaration. 1. The count is in effect that, upon the sale, the defendant falsely and fraudulently represented, that he had not cut any pine timber upon any of the lands, and had not given any permits to do so. This representation of the

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defendant certainly was not true ; and it is admitted not to be true as to lot No. 58, of the twenty-four lots sold. But I am not satisfied from the evidence, that the defendant ever allowed any timber to be cut upon any other of the lots sold to the plaintiffs. It is said, that permits had been given to cut timber on lots 27 and No. 70. But I am not satisfied, that there is any sufficient proof thereof ; and the weight of the evidence appears to me the other way. As to lot 58, it appears, that in 1822 the defendant gave two permits to cut timber on that lot: one permit for \$458, and another for \$125, amounting in all to the sum of \$583. As to lot No. 70, Isaac Boynton, in his second deposition, says, that the trees, which were *down*, were cut down (he supposed) by trespassers. The other evidence does not, I think, overcome the presumption, that this was the actual state of the facts. As to lot No. 27, it was burned over 20 years before 1842 ; and the defendant had purchased of the Commonwealth, and had owned all the lots sold about 30 years. Now, two considerations are, upon this posture of the evidence, as to this count, material. (1). Did the defendant fraudulently misrepresent the fact, that he had never given permits to cut pine timber on any of the lots, knowing the statement to be false ?¹ Or, had he simply forgotten the single instance on a single lot (lot No. 58), where permits had been granted 30 years before the sale to the plaintiffs, and the representation made by himself ? My opinion is, that, taking all the circumstances together, there is no reason to believe, that the defendant actually meant to misrepresent the real facts ; but that he, after such a lapse of time, had totally forgotten the whole transaction. (2). Had the representation, whether it was true or false, any influence on the purchase of the plaintiffs of the 24 lots for 61,903.37, the value of the timber actually cut not exceeding

¹ See *Foster v. Charles* (6 Bing. R. 396 ; 7 Bing. R. 105).

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\$600? My opinion is, that it had no influence on the bargain, and that the purchase would not have been given up, or varied, if the facts had been fully made known. Besides; Is it not a fair presumption, taking all the evidence in the case, that the statement made by the defendant was, as to his *general* practice only; and that this was all that he intended to represent? If so, it was substantially true, and it could in no manner effect the *boná fides*, or the validity of the sale. Under all the circumstances, I think, that the first count is not supported.

As to the second count, it depends entirely upon the fact, (1). Whether Messrs. A. Stetson, jr., and Garland, or either of them, were the general agents of the defendant in this transaction, so that their declarations should and ought to bind him; for there is no proof, that the defendant personally made any such declarations as this count supposes. (2). Whether, if they were the general agents of the defendant, they did in fact make any such declarations, as the count supposes. (3). Whether, if the declarations were made, they were fraudulently made. Both Stetson, jr., and Garland deny, that they were general agents, or any agents at all, except to show the location and boundaries of the lots; or that they had any instructions. They assert, that they made no false or fraudulent declarations, and that they never professed to act as general agents. They also swear, that the exploration made by them was fair. This count, therefore, upon the evidence, involves various considerations. (1). The fairness of the exploration. (2). The statements of Stetson and Garland, as to the unexplored lots. (3). The matters of opinion expressed by them. A. Stetson and Garland both state, that they acted fairly, and gave their real opinions; that they made no attempts to mislead; that Chamberlain voluntarily discontinued the exploration; that the exploration, as far as made, was entirely fair. There is now evidence both ways as to the

timber on the unexplored lots. The plaintiffs say, that it is less than that of the explored lots. The defendant says, that it is more, or, at least, equal to that of the explored lots. There is a conflict of evidence on the point, and under such circumstances the *onus probandi* is on the plaintiffs. The case is not made out on their part; and, therefore, this second count is not sustained. The direct evidence of Chamberlain is not sufficient to overturn the counter statements of the other witnesses.

As to the 3d count. This count relies on the allegation, that the map or plan was shown to the plaintiffs "as a true map or plan of the said lots, and as a true representation of the pine timber standing on the same; and that a large quantity of timber was marked and indicated thereupon as pine timber standing upon the said tracts, and that the defendant falsely and fraudulently represented and affirmed, that the said tracts of land were covered with pine timber in the parts and to the extent indicated in the said map or plan;" all of which representations were false. The original map shown by the defendant to the plaintiffs is now before us. There are dotted places, as for timber, on it. The map is small, and not an original plan by a surveyor. There is no pretence, that the map indicates the *quantity* of pine timber on the lots. But it is said, that it does indicate the location or position of the pine timber on the lots. Be it so. But in the present suit, the *quantity* of timber is the material inquiry, and not the *location* of the timber. It must have been so understood by both parties, when the map was shown, and the sale made. Suppose the location was not correct, yet if a full proportion in quantity was found on the lot, there would be no pretence to say, that the mistake in the representation on the map would avoid the sale.

But it is clear, that the defendant did not know much personally about the lands. He said, at the time, that he had

not personal knowledge of the lands, and that he had not explored the lands. He told Bell, and Chamberlain also, that they must examine for themselves. Chamberlain did examine for himself. [Here the Judge commented on the testimony in the case of Chamberlain and Messrs. Stetson, jr. and Ewer on this point]. Now, under all the circumstances, what effect ought such a map necessarily to produce upon the mind of any purchaser? What effect did it, in fact, produce on these purchasers? Were these purchasers governed by the map, or by Chamberlain's exploration? Chamberlain says, that the defendant did not make any representations of the *quantity* of pine or other timber on the Carmel lands. It must be proved, that the defendant knew, that the map was false, as to the *location* of the pine timber on the lots; for the allegation is, that he falsely represented it to be true. The map is too vague and indefinite, as evidence, to establish any fraud as to the quantity, or as to the location of the pine timber. The map was in the plaintiffs' possession at all times. Why did they not, for six years after the purchase, ascertain its exactness, and whether it was false; or if false, whether it was fraudulently false?

As to the 4th count. The fourth count alleges as its foundation, that the defendant made a false affirmation, that there were fifty millions of feet of pine timber on the lots. Now, the material part of the evidence to support this count is Chamberlain's testimony, that on his return, to Bangor, he showed the defendant his estimates of the pine timber on the lots, and the defendant said, "that, as far as he had knowledge, they were correct; but he had gone over but a few of his lands. Persons seldom estimate timber lands too high." Chamberlain's own estimate made the amount over fifty millions of feet of pine timber. How does this statement of the defendant, as testified to by Chamberlain, even if his testimony be true, support this count? It is one thing for the party to affirm a thing to be positively so, and quite another

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thing to assert, that, as far as the party has knowledge, it is so. Chamberlain, at that time, relied upon his own personal exploration, and affirmed, that there was as much pine timber, as his own estimate stated, and that the statement was made *bona fide*. Yet, now, it is said to be a fraud in the defendant, that he came to the same conclusion. Which had the best means of knowledge, Chamberlain or the defendant? Chamberlain says, that he does not recollect, that he told the plaintiffs of the defendant's estimate of the lands, or what he said as to that; but he only communicated the map, and his own estimate, and the terms of sale of the defendant. What influence, then, could the defendant's remarks have had upon the purchase by the plaintiffs? If they never knew, that they were made, the plaintiffs could not be deceived by them. There seems to me, no ground, therefore, to sustain the fourth count.

As to the 5th count. The fifth count relies upon the false representation of the defendant, as to the quantity of timber on certain lots. This is endeavored to be maintained solely upon the supposed statement of the defendant's agents, or upon the conversation with Chamberlain, when his estimate was shown to the defendant. The same considerations apply here as apply to the second count, and with the same force and stress.

The 6th count merely embodies the others; and therefore requires no distinct consideration.

I have thus finished this brief review of the several counts, and have no difficulty in saying, that none of them are, in my judgment, sustained by the evidence. Hitherto nothing has been said by me as to the comparative credibility of the witnesses. The plaintiffs' case stands wholly, or mainly, upon the credibility of Chamberlain and Coffin. Chamberlain stands in a peculiar situation. He was a co-purchaser in effect. He was the agent, who made the bargain. His tes-

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tinony is given after several years have elapsed, and it is of mere oral conversations and statements made by the other parties, after great changes of opinion on the part of the plaintiffs as to the value of the property, and great changes in its market value. Chamberlain, until a recent period, constantly affirmed, that the bargain was a good one. He is contradicted in many things stated by him, by Garland and Stetson, jr. Under all the circumstances,—the great lapse of time, the intermediate acts and acquiescence of the plaintiffs, the difficulty of giving entire credit to witnesses, testifying to conversations and occurrences several years ago, and the conflict and opposition of the evidence on many important particulars, I should not feel myself justified in saying, that there was a sufficient ground, on which the Court ought to pronounce a judgment for the plaintiffs. I am well satisfied, that it is my duty to declare, that the plaintiffs have not made out their case, and that judgment ought to pass for the defendant.

Judgment for the defendant.

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HENRY WINSOR, ASSIGNEE,

v.

EDWARD AND WILLIAM H. McLELLAN.

A BILL of sale of one half of a vessel, as collateral security for a debt, with a provision, that the mortgagors may keep possession of the vessel, and use her for their own benefit until default of payment, is valid, as an immediate conditional sale.

Delivery of possession, to a purchaser, of a moiety of a vessel, when in the possession of the other part owner, is not, in general, indispensable to pass the property.

As between the mortgagor and mortgagee notice to the part-owner in possession is not necessary.

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By the Revised Statutes of Massachusetts, it is not necessary, as between the parties themselves, that a mortgage of personal property should be recorded.

The assignee in bankruptcy, except in cases of fraud, stands in no better situation than the bankrupts themselves.

The fact, that one of the mortgagors made oath at the custom-house, subsequent to the bill of sale, that the vessel belonged to him and his partner, cannot affect the rights of the mortgagee.

The bankrupts, some months previous to their bankruptcy, conveyed, by a bill of sale, as collateral security for a debt of \$2000, one half of a vessel, of which the other half was owned by the master, and agreed to assign all future policies of insurance thereon, as further security for the same debt, which was done, it being agreed, that the mortgagors might use the vessel for their own benefit, until default of payment. The bill of sale was not recorded. The vessel, at the time the bill of sale was made, was at sea, in the possession of the master. Between that time, and the filing of the petition for the benefit of the bankrupt law by the mortgagors, the vessel came once to Boston, the place of business and residence of the mortgagors, and twice to Bath, the place of business and residence of the master, but the mortgagees did not take possession. Five days before the filing of the petition they sent notice to the master of the bill of sale. The said mortgaged moiety of the vessel having been sold by direction of the assignee; *It was held*, that the proceeds of the sale should be paid to the mortgagee.

THIS was the case of a question adjourned into the Circuit Court from the District Court of Massachusetts. The petition set forth, that Edward and William H. McLellan, of Boston, merchants and co-partners, of whom the petitioner, Henry Winsor, of Boston, was the assignee in bankruptcy, included in the schedule of their assets one half of the brig Napoleon, at sea, and in the schedule of their liabilities, \$2000 due to the trustees of Mrs. Rebecca S. McLellan, secured by a bill of sale of one half of the brig Napoleon. The bill of sale was made Dec. 9, 1841, and the petition of the McLellans for the benefit of the bankrupt law was filed Nov. 22, 1842. In the intermediate time, the trustees did not take possession of the vessel, but the bankrupts employed her for their own

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use. And on April 28, 1842, Edward McLellan made oath at the custom-house, that he and his partner, and George W. Jordan, were the owners of the brig. Jordan was the master of the vessel, and owned one moiety.

The trustees, on the 8th of April, 1843, petitioned the court for leave to sell the half of the brig, which had been conveyed to them, and the sale was authorized to be made under the direction of the assignee. The sale took place, and the trustees executed a conveyance, but the collector refused to issue a new register, unless upon a transfer by the assignee. The assignee accordingly executed a bill of sale to the purchasers, and received the purchase money, amounting to \$1600, which sum was subject to deductions, for payments and charges, of \$133.59. The balance was claimed by the assignee to be paid into the general fund, for the benefit of the creditors.

The answer of the trustees, in addition to the above facts, set forth, that the policies of insurance, made upon the said moiety, subsequent to the bill of sale, had been transferred and made payable to them, and that it was agreed, at the time the bill of sale was given, that the bankrupts should use the vessel until default of payment. The vessel, at that time, was at sea, but between that time and the time of filing the petition for the benefit of the bankrupt law it had been once at Boston, and twice at Bath, where the master lived. The trustees did not take possession; but, on the 17th of November, 1842, they addressed a letter to the master, notifying him of the transfer to them, and, subsequently to the receipt of that letter, the vessel was managed for the joint use of the trustees and the master. The answer concluded with a prayer, that the assignee be ordered to pay over to them the balance of the proceeds in his hands, and for costs.

Upon these facts, the question was adjourned into the Circuit Court.

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Wm. Gray for the petitioner; *Sidney Bartlett* for the respondents.

STORY, J. — In considering the present question, it should be constantly borne in mind, that there is no provision in our Bankrupt Act of 1841, ch. 9, corresponding with the provision in the statute of 21 Jac. 1, ch. 19, § 10, § 11, and the more recent statutes of England, respecting reputed ownership in cases of bankruptcy.¹ There is no proof, nor even any allegation of fraud between the trustees and the bankrupts, with a view to delay or defeat or defraud their creditors, in the present transaction. So that the case stands drily and nakedly upon the mere rights of the assignee, acting for the general creditors, under a general assignment in bankruptcy. Now, the principle has been long established, that the assignee in bankruptcy does not stand in the position of a purchaser, nor even in so favorable a position as an individual creditor may stand.² The assignee in bankruptcy takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition, that the bankrupt himself held it, and subject to all the equities, which exist against the same in the hands of the bankrupt. This was clearly laid down by Lord Hardwicke in *Brown v. Heathcote* (1 Atk. 160, 162), and has ever since been adhered to, not only in Courts of Equity, but also, as the case of *Leslie v. Guthrie* (1 Bing. New Cas. 691), abundantly shows, at law. But I need not dwell upon this point, as it came very fully under consideration in the case of *Rand, Assignee v. Winslow*, at the last October Term of the Circuit Court in Maine.

¹ See statute of 6 Geo. 4, ch. 16, s. 72.

² 2 Story Eq. Jurisp. s. 1228, s. 1411; *Langton v. Horton* (1 Hare R. 547, 563); *Muir v. Schenck* (3 Hill R. 228); *Murray v. Lylburn* (2 John. Ch. R. 441, 443); Deacon on Bank. ch. 10, s. 3, pp. 320, 321, edit. 1827.

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It appears from the facts disclosed by the petition and answer, that in July 1841 the trustees had in their possession \$2000 of trustee money, belonging to the *cestui que trust*, Mrs. S. M. McLellan, the wife of one of the bankrupts, and that they lent that sum to the firm of E. & Wm. H. McLellan, (the bankrupts); and on the 9th of December, 1841, upon a settlement with the firm, they took an accountable receipt from the firm for the payment of that sum and interest, on demand; and at the same time, they took as collateral security a bill of sale of the one half of the brig Napoleon, then at sea, the one half being owned by the firm, and the other half being owned by one Jordan, who was then master thereof. And it was at the same time agreed, that the policy, then existing on the one half of the brig on behalf of the firm, should be assigned to the trustees, and also all policies on her future voyages, as collateral security for the same purposes. Assignments were accordingly made on the respective policies. No notice was given to the master of the bill of sale by the trustees, or otherwise, until the 17th of November, 1842, when a letter was written to him by the trustees, informing him of the fact, the brig then being abroad. Up to this period the firm had the possession and use of the brig in common with the master, and received the profits and earnings thereof, the brig having returned once to Boston (the place of residence and business of the firm), and twice to Bath, the place of residence and business of the master. The firm petitioned for the benefit of the bankrupt act on the 22d of November, 1841, (five days only after the letter was written) and were duly declared bankrupts on the 3d of January, 1843.

It is under these circumstances, that the assignee, on behalf of the general creditors, insists that the want of delivery to and possession by the trustees is fatal to their claim, and that no property passed to them under the bill of sale made by the

bankrupts to the trustees, one of the trustees being one of the bankrupts. In the petition, there is no allegation, that the bill of sale was made to the trustees in contemplation of bankruptcy, and therefore, that question, as well as the question, whether the conveyance was intentionally fraudulent, might properly be laid aside, as not belonging either to the allegations or the proofs in the statements of the parties. I shall, nevertheless, take occasion to speak a few words to the point, as if it were properly presented by the proceedings before the Court.

The first objection to the conveyance, taken by the petitioner, is, (as has been already suggested) that there was no delivery or possession of the brig made or taken by the trustees; nor, indeed, any notice of the transfer, given to the master, until five days before the bankruptcy; so that, in point of fact, during all the intermediate period between the conveyance and the notice, the grantors had the full possession and use of the brig and of her profits. Now, in the first place, it is clear, that there can be no delivery of possession of a ship by one part owner of his share to a purchaser, when the actual possession is in another part owner; such, for instance, as in the present case, where the master is owner of a moiety of the vessel, and in actual possession thereof. The most, that can, under such circumstances, be required is, that the master, or other part owners, should have notice of the transfer, so as to put them in a correct position, so far as their own rights are concerned. That actual possession by a purchaser of the share of a part owner is not indispensable, at least in ordinary cases, is clearly established in *Addis v. Baker* (1 Anst. R. 222); and was affirmed in the case of a mortgage of an undivided share of a ship, in the case of *Gillespie v. Coutts* (Ambler. R. 652).¹ In the next place, however the

¹ See also Abbott on Shipp. by Shee, pt. 1, ch. 1, s. 3, edit. 1840;
2 Kent. Comm. s. 45, p. 132, 4th edit.

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case may be as to a subsequent purchaser without notice, or to a creditor claiming by judgment and execution, where no possession is given by the part owner, or notice of the transfer given to the other part owners in possession (which may require the application of a different principle), it is clear, that, as between the parties themselves to the transfer, the conveyance will pass a complete and effectual title, independent of the delivery of any possession. This is a known and old rule, applicable to the sale of all personal chattels.¹ In cases of bankruptcy, (independently of fraud), as we have already seen, the assignee can take only what the bankrupt himself could lawfully hold; and he succeeds merely to that title, and nothing more. Nay, even in cases of reputed ownership, in bankruptcy, under the provision of the statute of 21 Jac. 1, ch. 19, § 10, § 11, the omission of mortgagees to take possession of a ship for nine months after the transfer to them, and leaving the ship in the intermediate time in the possession and management of the mortgagors, has been held not to affect the title of the mortgagees, as against the assignees in bankruptcy, the mortgagees having, in fact, taken possession before the bankruptcy of the mortgagors; for the court said, that the ship could not be treated as within the order and disposition of the mortgagors at the time of their bankruptcy. Lord Chief Justice Abbott on that occasion added; "The bill of sale might be void upon the statute of Elizabeth, as against creditors; but not as against the parties, who executed it; and their assignees are in this respect in no better situation."² The case of *Briggs v. Parkman* (2 Metc. R. 258) is a very strong authority to show, that the omission to take possession of the mortgaged premises, being personal property, and agreeing, that until condition broken the mort-

¹ See 2 Black. Comm. 448.

² *Robinson v. McDonnell* (2 Barn. and Ald. 134, 136); see also the remarks of Mr. Justice Bayley in the same case.

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gagor may retain the possession and use thereof, nay, even may sell and dispose thereof, substituting other property as security, are not to be deemed *per se* acts of fraud upon creditors; but the presumption of fraud may be repelled, and the conveyance held good against the general assignees under the Insolvent Act of 1838, ch. 163.

But it is further objected, that, notwithstanding the formal bill of sale to the trustees, yet, taking the other papers, the receipt given by the trustees, and the order on the policies, it was not the intention of the parties, that the title should pass to the trustees, but that the bill of sale and order were to be held as collateral security, and on repayment of the debt, the "bill of sale and order for insurance shall be returned to the owners, and be null and void." It strikes me, that this is a very forced and unnatural construction of the proceedings of the parties. Their manifest object was to give collateral security to the trustees, by way of mortgage on the vessel itself, and on the policies underwritten thereon, and not merely for them to hold the bill of sale as a formal instrument by way of pledge, without giving effect to it as a conditional transfer of the property. The permission of the owners to take the profits and earnings of the vessel in the intermediate time, and until the debt was to be paid, was not inconsistent with, but in pursuance of, the original agreement. The policies were underwritten, exactly as they should be, in the name of the mortgagors, who were the general owners, subject only to the rights of the mortgagees. The subsequent change of the papers by Edward McLellan, without the consent or knowledge of the trustees, could not change their rights, even if he intended thereby to affect them, of which there is not any evidence. In short, it appears to me, that no other sensible construction can be put upon the original transaction, than to treat it as an immediate conditional sale of the moiety

of the vessel to the trustees, as collateral security for the debt due to them.

But, then, it is said, that if the bill of sale is to be deemed, with the accompanying papers, to have created a mortgage, (as I think it clearly did) then it is void, because it was not recorded, as required by the Revised Statutes of Massachusetts, ch. 74, § 5. That section provides, "That no mortgage of personal property, hereafter made, shall be valid against any other person, *than the parties thereto*, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be recorded by the clerk of the town where the mortgagor resides." It may well admit of doubt, whether the statute was intended to apply to any cases of mortgages of undivided interests in personal property, of which, of course, no exclusive possession could be given to, or retained by, the mortgagee. But, assuming it to be otherwise, still the statute expressly holds such unrecorded mortgages to be valid between the parties; and the assignees in bankruptcy, as we have already seen, except in cases of fraud, take only what the bankrupt himself is entitled to.

But then again, it is urged, that the transaction is void under the second section of the Bankrupt Act of 1841, ch. 9, as a conveyance made in contemplation of bankruptcy, and for the purpose of giving the trustees an undue preference as creditors. Now, this argument is mainly, if not wholly, founded upon the ground, that the conveyance is not to be treated as a sale or conveyance of the moiety of the vessel to the trustees until the 17th of November, 1842, (only five days before the bankruptcy), when they gave notice to the master of the brig of their title, which notice, however, as the brig was then abroad, did not reach the master until long afterwards. But it appears to me, that the foundation, on which the argument rests, utterly fails; for in the view, which I take

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of the matter, the bill of sale took effect, as a mortgage, at the time of the execution and delivery thereof to the trustees on the 9th of December, 1841. There is no pretence to say, that at that time, either the mortgagors or the trustees contemplated any bankruptcy of the mortgagors. The notice to the master was not necessary to found a title in the trustees; but it was at most only an assertion of their title, necessary to be made for the protection of the master, and for the protection of the trustees against any subsequent *bona fide* purchaser or judgment creditor. The notice took effect from the time, when it was sent to the master; and the time, when it reached him, is not material, so far, at least, as the present assignee is concerned. The only remaining consideration, under any aspect of the case, would be as to the conveyance being founded in a positive actual fraud upon the creditors of the bankrupt. But this, upon the facts stated in the case, cannot be either inferred or presumed. And, indeed, as has been already suggested, no question arises under the petition and answer in the present case, either as to the conveyance having been made in contemplation of bankruptcy, or with an intent to defraud the creditors of the bankrupt.

Upon the whole, I shall direct it to be certified to the District Court, upon the question adjourned into this Court, that upon the facts set forth in the said petition and answer, the said one half of the said brig Napoleon, after the said Edward and W. H. McLellan were decreed bankrupts, was the property of, and should be holden by the said trustees, for the benefit of the said Rebecca McLellan, and that it was not the property of, or to be holden by the said assignee, for the benefit of the creditors of the estate of the said bankrupts.

IN THE MATTER OF EPHRAIM BROWN, IN BANKRUPTCY.

THE characteristics, which distinguish checks from bills of exchange, are, that checks are always drawn on a bank or banker; that they are payable immediately on presentment and without days of grace; that they are not presentable for acceptance, but only for payment. The want of due presentment of a check and of notice of the non-payment thereof, only exonerates the drawer in so far as actual damages have thereby resulted to him.

A check is an appropriation of the drawer's funds in the hands of the banker to the amount thereof, and consequently the drawer has no right to withdraw them before the check is paid.

If the drawer of a check sustain no damage by want of due presentment and notice, and the non-payment of the check arise from his own default, or from his want of funds, he is liable to the holder for the full amount of the check.

The holder of a check is not bound to receive part-payment thereof, even if the bank be willing to pay it in part. He has a claim to the entire sum named therein

In cases of a fluctuating balance between the drawee and the drawer of a bill of exchange, or where a drawer draws in the belief, that he has funds, or in the reasonable expectation, that he shall have funds to meet it, he is entitled to notice of its non-payment; but otherwise, he is not.

Certain checks were drawn in favor of C. by Green, the general agent for D., as collateral security for a promissory note, made by them, payable to D. for his accommodation, which said note was discounted at the Grand Bank of Marblehead, and not being paid by D. was taken up by C. The checks, which were for \$703.50, \$726.52, respectively, were made payable to C. or order, on two certain days, and were presented on those days, but not on the last days of grace; but during the three days of grace, the drawer had not sufficient funds in the bank, on which they were drawn, to pay either, although there was a small balance there in his favor. *It was held*, that the checks were properly presented, and were not entitled to days of grace; that D. was not entitled to notice, and that, even if the checks had not been properly presented, and notice had not been properly given, D. was liable for money paid by C. at his request and for his use; that the fact, that they were payable at a certain day, and not on demand, did not change their nature from checks to bills of exchange, and that Green, being the general agent of D. was fully empowered to waive the presentment of the checks and the giving of notice.

MESSRS. Wm. Courtis & Co. proved as a debt against the estate of Ephraim Brown, a bankrupt, the following checks :

“ Granite Bank. 703 dolls. 50 cts. Boston, April 18th, 1841. Pay to W. Courtis & Co., 18th May, or bearer, seven hundred three dollars thirty cts. To the Cashier. Ephraim Brown, by J. W. Green.”

“ Granite Bank. 726 dolls. 52 cts. Boston, April 18th, 1841. Pay to W. Courtis & Co., 10th June, or bearer, seven hundred twenty-six dollars fifty-two cts. To the Cashier. Ephraim Brown, by J. W. Green.”

Whereupon, Henry Winsor, assignee of Ephraim Brown, filed a petition to the District Judge to expunge the claim of W. Courtis & Co. from the list of debts, proved against the bankrupt's estate, and setting forth the following specification of the reasons to support the petition :

“ 1st. He says, that the papers, set forth in the said T. Courtis's proof, as checks of said E. Brown, are, in fact, bills of exchange, and that he, as drawer, is entitled to all the rights of drawers of such bills.

“ 2nd. That whether said papers are to be considered as checks or bills, the said E. Brown was, in the circumstances of this case, entitled to expect, that they should have been duly presented for payment to the drawee, and demand made, and that notice of their dishonor should have been duly given to said E. Brown ; and he avers, that such demand and notice have not been made and given.

JOHN CODMAN, Counsel for said Assignee.”

Afterwards Thos. Courtis, of the firm of W. Courtis & Co. filed a petition to the District Judge, which, after setting forth the above stated facts, proceeds as follows :

“ And your petitioner further represents, that, in the course

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of making preparation to meet and contest the allegations of the said assignee in the premises, to wit, on the sixteenth day of December instant, your petitioner discovered evidence, tending to prove the following facts, which your petitioner avers and alleges, viz. That on the eighteenth day of April, 1841, one Joseph W. Green, then, and for a long time previous, the duly authorized agent of the said bankrupt, at the request of the said bankrupt, borrowed of the said William Courtis, for the use and accommodation of the said bankrupt, the negotiable promissory note of the said William Courtis & Co., in the words and figures following, to wit, "\$1450. Boston, April 18th, 1841. For value received, we promise to pay Ephraim Brown, or order, fourteen hundred and fifty dollars in four months. (Signed). William Courtis & Co." Which said promissory note was delivered by the said Green to the said bankrupt, who endorsed, and procured the same to be discounted at the Grand Bank in Marblehead, the proceeds of said discount being appropriated by the said Brown to his own use.

"And your petitioner further alleges, that the said promissory note, at its maturity, was not paid by the said bankrupt, but was paid by the said William Courtis & Co. for the use and accommodation of the said bankrupt, and the amount so paid, together with interest thereon, is still justly due from the said bankrupt to the said William Courtis & Co. And your petitioner further alleges, that at the time when the said promissory note was made and delivered to the said Green for the said bankrupt, the said Green, in the name and behalf of the said bankrupt, drew the checks described in said proof, as a security to the said William Courtis & Co. against their liability upon the said note; and to this end the said checks were made payable prior to the maturity of the said note, and the interest on each moiety of the sum expressed in said note from the day, on which each check was payable, to

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the day of the maturity of the said note, being discounted, the said checks were drawn accordingly. And your petitioner further alleges, that, on the day, when the said checks were drawn and delivered, the said bankrupt had no right to draw the same, or to expect that the same would be paid; and that on the days when the said checks respectively became due, the bank, on which they were drawn, could not, and did not pay the same, for want of funds of the said bankrupt; and that the said Green, after the said checks were made and delivered, and before either of them became due, still acting in that behalf, as the duly authorised agent of the said bankrupt, informed the said William Courtis, that the same would not be paid, and requested him not to present the same at the bank on which they were drawn."

The case was adjourned from the District Court into the Circuit Court, upon the following agreed statement of facts:

"It is agreed by the parties, that the checks, recited in the said proof of debt, were drawn by an authorised agent of the bankrupt in his name and on his behalf. At the opening and close of the days, on which the said checks were drawn and delivered to the said William Courtis & Co., the balance on the books of the bank, on which they were drawn, to the credit of said Brown, was \$30.89. The said check for \$703.50 was presented by a servant of Courtis & Co., at the counter of the Granite Bank, during business hours, on the eighteenth day of May, 1841, and the teller replied, 'there is nothing here.' The said check for \$726.52 was presented at the counter of the said bank twice in business hours, by an agent of the said Courtis & Co., on the tenth day of June, 1841, and the teller replied each time, 'it is not good.' On the next day, the servant of Courtis & Co. again presented both checks at the counter of the said bank, in business hours, and inquired if any money had been deposited to meet those

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checks, and the teller replied, 'there has not.' In point of fact, there was a balance to the credit of the bankrupt on the books of the bank on the 18th, 19th, 20th, and 21st days of May, of \$6.11, and on the 10th, 11th, 12th, and 13th days of June, a balance of \$20.72.

"And the said creditors introduced the depositions of Joseph W. Green and Robert H. Darrah.

"At the request of the parties, it is ordered by the Court, that the questions, whether upon the facts, agreed by the parties, and stated in the said depositions, the proof of debt made by the said Curtis & Co. *et al.* or any part thereof, ought to be expunged; and whether the said Curtis, *et al.* are entitled to any, and what relief, under their petition, filed since the making of said proof, be and the same are hereby adjourned into the Circuit Court, to be then heard and determined.

"FRANCIS BASSETT, Clerk of the Court."

The case was argued by *John Codman*, for the assignee; and by *W. W. Story*, (with whom was *G. T. Curtis*) for the Messrs. Curtis.

Codman, for the assignee, argued as follows:

1. The evidences of debt filed by Messrs. Curtis are not checks, but inland bills of exchange; and the fact, that the time of payment was future and certain, distinguishes these instruments from checks; *Cruger v. Armstrong* (3 Johns. Cas. 9); *Bayley on Bills*, 236; *Merchants' Bank v. Spicer* (6 Wend. 445); *Mohawk Bank v. Brodenck* (10 Wend. 304); *Story on Bills*, 63. These papers, then, being bills of exchange, the drawer of them is entitled to insist, that they should be duly presented, and notice of their dishonor given to him, (*Story on Bills*, 251, 346, 400). Nor does the fact, that there was a deficiency of funds in the bank to meet these

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checks by any means excuse demand and notice, for so long as there were any funds, however inadequate, the drawer is entitled to his strict right of a proper presentment and notice. Bayley on Bills, 316, 317; Story on Bills, 252, 311; *Lutcliffe v. McDowell* (2 Nott and McCord, 256); *Blackhan v. Doren* (2 Camp. 504); *Legge v. Thorpe* (12 East, 176); *Bickford v. Ridge* (2 Camp. 539); *Haig v. Moses* (2 Nott and McCord, 433).

In this case, the checks were drawn *bonâ fide*, and the testimony of Mr. Green shows, that he had an immediate expectation of funds in the bank in order to meet them.

No proper demand was made. It was not sufficient, that the checks were presented on the day named therein, for they were not due until the days of grace had expired. By the Massachusetts Revised Statutes, ch. 33, § 5, grace is to be allowed on all bills and orders for money payable at a future day certain. This statute, therefore, controls these checks, inasmuch as being payable at a future day certain, they come within its terms.

Nor was proper notice given; for the mere fact, that the drawer knew that he had no funds in the bank does not amount to notice. It is a strict right to which Brown was entitled, by the principles, which govern bills of exchange.

If any weight is to be given to the waiver, by Green, of presentment and notice, it can only apply to the first check; for it was made nearly a month before the second became due, and, as he speaks of being in funds *in a few days*, he could only have been speaking of the first.

Story, for the plaintiffs, said :

1. These were checks drawn by Green, as agent of Brown, within the scope of the authority expressly conferred upon him by his principal. Green is, therefore, bound to pay them, whether he knew, that they were drawn or not. The whole

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evidence shows, that Green's authority was unlimited, and that he was held out to the public by Brown as his general agent. This, by the very first principles of agency, renders the principal liable for all his acts, unless they were known to exceed his authority. If Green, therefore, merely pretended to have an authority, which he had not, he would render his principal liable to all persons trusting in good faith to such a pretence. Third persons are not bound to scrutinize the powers of general agents, but they may trust to their apparent authority (Story on Agency, § 183). Brown and Green are, therefore, to be considered as one person, in this transaction.

2. These were merely checks, payable on a future day certain. They are not promissory notes, nor bills of exchange, and are not to be governed by the same exact rules. They are merely orders upon the bank to pay the sums named therein, and are not a promise to pay, but a draft for a debt due. The fact, that the day of payment is fixed and certain, does not alter the character of these instruments, so as to make them bills of exchange; it is merely directory, and by no means in the nature of a condition precedent, as would have been the case if the instruments had been notes.

These checks, therefore, not being bills of exchange, or promissory notes, are not entitled to days of grace, any more than checks payable on demand; and presentment on the days specified therein was proper and sufficient. If there were any doubt about this point, the invariable custom of merchants and bankers would determine it to be as stated.

3. A check, however, bears an analogy to a note, in some respects. Brown may be considered as the maker, and the bank as the place of payment. Now, the holder of a note is not bound to make a presentment thereof, before he can bring an action against the maker, where the time and place of payment are specified; for the action itself is presentment and notice. Nor need presentment and notice be proved, in order to

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render the maker liable ; it is only a matter of defence by the maker, that he was ready and present at the place, and had the money there to pay the note. The maker of these checks, then, must prove, that he had funds at the bank to meet them when due, and that he was ready to pay them, or he will still be liable, although there should have been no presentment or notice. The agreed statement of facts finds, however, that he had not funds sufficient to pay these checks at the bank.

If the maker of a note sustain any injury by non-presentment, the burden of proof is upon him to show it ; and if he do show it, and it be susceptible of estimation, he can recover damages *pro tanto* only. Now, in the present case, there is no pretence that any injury resulted to Brown from want of presentment and notice. On the contrary, the non-presentment was a benefit : it postponed the claim.

4. These checks also resemble, in some respects, bills of exchange. The holder of a bill, however, is generally bound to make presentment thereof and give due notice of its dishonor. But this is only a general rule, and the *exception* is, that where there are no funds in the drawee's hands, and no promise or obligation by the drawee, authorising the drawing the bill, no presentment or notice is necessary. The reason of the rule is, that injury may accrue to the drawer, from non-presentment and want of notice. The reason of the exception is, that in cases where it applies no injury can accrue. Presentment in the present case would have been useless, for there were not sufficient funds of the drawer at the bank to pay either check, and the fact, that there was a small sum there in his favor, does not make a presentment necessary ; because a check, or bill of exchange, or note, is an *entirety*, and the holder thereof is not bound to receive a part. Nor would the bank be bound to pay a part, as the holder would not, in such a case, be willing to part with the evidence of debt.

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Nor was notice necessary ; for Brown knew, or ought to have known, that he had no funds in the bank to pay the checks, and, therefore, he knew, that they were not paid. Knowledge is notice. Besides, right to presentment and notice belongs to endorsers only, and in respect of them only does the want thereof afford an *absolute* presumption of injury. But, as between drawer and drawee, the presumption of injury is only *prima facie*, and may be rebutted by evidence, that no injury was, in fact, sustained. *Beckendike v. Bollman* (1 Term R. 405) ; *Rogers v. Stephens* (2 Term R. 713) ; *Legge v. Thorpe* (12 East, R. 171) ; Story on Bills of Exchange, § 367.

The only cases in which presentment or notice have been held to be necessary in the case of a bill of exchange drawn upon a bank or banker, not having sufficient funds of the drawer to meet it, are cases where there was a fluctuating balance, and where the drawer drew upon the fair supposition that he had funds, or that there would be funds to meet it by the time that it was due ; and the reason for requiring notice is, that otherwise the drawer would suppose the bill to be paid. But that is not this case.

5. If these were inland bills of exchange, Brown was the drawer and the bank the acceptor. Now, Brown had no right to draw upon the bank without having sufficient funds there, or without a reasonable expectation, that there would be funds there when the bills were due. As Brown had no funds there, and as no expectation is shown to have existed on his part, that funds would be there, the drawing of these checks was a fraud upon the drawer, and absolves the holder from presentment and notice.

6. Besides, there was an express waiver of presentment and notice by Green, and he was fully authorised as the agent of Brown to make such a waiver.

In respect to the Equity of the case, we would say, that the

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right to presentment and notice is a mere technical right, the non-compliance with which worked no injury, and that to set up such a right to avoid the payment of a just debt, which has never been paid, is inequitable. A presentment was made on the day on which the checks were supposed by both parties to be due, and, as we contend, they were. Green's waiver refers to this day. And yet, by a mere technical objection, Brown claims to be absolved from paying a debt, which he justly owes, and in respect to which, as far as he knew at the time, Messrs. Courtis & Co. did all that was necessary. If a Court of law shrink from rigidly enforcing this technical right, and introduce exceptions, where no injury results, will not a Court of Equity insist, that injury shall be shown as a basis of defence?

STORY, J. — I cannot say, that I entertain any doubt upon either of the questions, which have been argued in this case, although they are presented under somewhat novel circumstances. The argument for the assignee resolves itself into these points, (1). That these instruments, although in the form of checks, are, in fact, inland bills of exchange, and governed by all the rules thereof, as to presentment and notice. (2). That here no due notice was given to the drawer of the presentment and dishonor of these checks; and that the circumstances, relied on as a waiver, do not justify the conclusion. (3). That the facts, relied on in the petition of the Messrs. Courtis, do not change the legal posture of the case, or entitle them to any relief in Equity.

In respect to the first point, the argument pressed is, that checks are always, and properly, payable on demand, and that when payable at a future time, they become, to all intents and purposes, inland bills of exchange. But I am not, by any means, prepared to admit the validity or force of this distinction; and no case has been cited, which, in my judgment,

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satisfactorily establishes it. A check is not less a check, because it is post-dated, and thereby becomes, in effect, payable at a future and different time from that, on which it is drawn, or issued. This is sufficiently apparent from the case of *Allen v. Keeves* (1 East, R. 435). That it may be declared upon as a bill of exchange, is no proof, that it may not also be declared upon as a check. In many cases, they are identical in their legal results; but by no means in all. Mr. Chitty very properly says, that a check *nearly* resembles a bill of exchange; but (he adds) it is uniformly made payable to bearer, and should be drawn upon a banker, or a person acting as such.¹ I agree, that it nearly resembles a bill of exchange; but *nullum simile est idem*. It is commonly, although not always, made payable to the bearer; but I conceive it to be still a check, if drawn on a bank or banker, although payable to a particular party only by name, or to him or his order. It is usually, also, made payable on demand; although I am not aware, that this is an essential requisite. The distinguishing characteristics of checks, as contradistinguished from bills of exchange, are (as it seems to me), that they are always drawn on a bank or banker; that they are payable immediately on presentment, without the allowance of any days of grace; and that they are never presentable for mere acceptance; but only for payment. Mr. Chancellor Kent, in his learned Commentaries, (3 Kent's Comm. 75, 4th ed.), says: "A check upon a bank partakes more of the character of a bill of exchange than of a promissory note. It is transferable like a bill of exchange. It is not a direct promise by the drawer to pay; but it is an undertaking, on his part, that the drawee shall accept and pay, and the drawer is answerable only in the event of the failure of the drawee to pay." But he has more fully explained his real meaning in a note to

¹ Chitty on Bills, 8th edit. ch. 11, p. 545.

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the index to the fourth edition of his Commentaries (4 Kent's Comm. p. 549, note *, 4th edition), which I adopt with entire confidence, as expressive of my own opinion: "A check (says he) differs from a bill of exchange in this, that it has no days of grace, and requires no acceptance distinct from prompt payment. The drawer of a check is not a surety, but the principal debtor, as much as the maker of a promissory note. The check is the acknowledgment of a certain sum due. It is an absolute appropriation of so much money in the hands of his banker to the holder of the check, and there it ought to remain until called for, and unless the drawer actually suffers by the delay, as by the intermediate failure of his banker, he has no reason to complain of delay not unreasonably protracted. If the holder does so unreasonably delay, he assumes the risk of the drawee's failure, and he may, under circumstances, be deemed to have made the check his own, to the discharge of the drawer. But this is quite distinct from the strict rule of diligence applicable to a surety, in which light stands the endorser, who has a right to require diligence on the part of the holder, to relieve him from responsibility. It is true, however, that there is so much analogy between checks and bills of exchange, and negotiable notes, that they are frequently spoken of without discrimination."¹

The case of *Cruger v. Armstrong* (3 John. Cas. 5) does not inculcate any different doctrine, when correctly considered. And the case of *Conroy v. Warren* (3 John. Cas. 259) expressly distinguishes between checks and bills of exchange; and puts the doctrine of the necessity of presentment for payment upon its true and reasonable ground; whether any damages have been sustained by the drawer by the delay or not; and I conceive that the point, as to notice of the dis-

¹ S. P. 3 Kent Comm. s. 44, p. 104, note, 5th edit.; *Little v. Phœnix Bank* (2 Hill, N. Y. R. 425); *Kemble v. Mills* (1 Mann. & Gr. 757).

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honor of a check, would mainly turn upon similar considerations.

We all know, from the history of inland bills of exchange, that, originally, they were not entitled to days of grace; and that days of grace were first established, as applicable to them, by the statutes 9th and 10th Will. 3, ch. 17, and 3d and 4th of Ann, stat. 2, ch. 9.¹ In Massachusetts, days of grace were not formerly allowed upon promissory notes, payable at a future time;² and the like rule was supposed to apply to inland bills of exchange, or, at least, the contrary was not established. This rule in Massachusetts was altered by the stat. of 1824, ch. 130, and by the Revised Laws of 1835, stat. 12, ch. 33, § 5, 6, which allow days of grace upon all bills of exchange, payable at sight, or at a future day certain, and on all promissory negotiable notes, orders, or drafts, payable at a future day certain. But no mention whatsoever is made in either statute of checks; but they are silently left to the known rules, practice, and usages of banks, which I believe to be invariable, never to accept them prior to payment, and always to pay them on presentment on or after the day stated for payment by the date, or upon the face of the check. Thus, if a check be dated on the 1st of December, and be payable on the 10th of December, it is presentable on the latter day, and on presentment on that day, it will be paid by the bank. It is never presented for acceptance, and no days of grace are ever allowed upon it. In short, it is always treated as payable on the very day designated as the day of payment. If it be asked, what is the reason of all this? The true answer is, that it is the usage of banks, and the understanding of the parties to the check, and being the constant habit of business, it becomes, like all the other usages of merchants, the *lex et norma*, by which to expound the contract. The parties have, in the present case,

¹ 2 Black Comm. 467.

² *Putnam v. Sullivan* (4 Mass. R. 45); *Jones v. Fales* (4 Mass. R. 245).

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used the common form of a bank check ; and by so using it, they impliedly authorize the bank to treat it as a check, and pay it as a check, payable on the very day, on which it is dated, or on which it purports to be payable, without any grace. The words of both these instruments are precisely alike, except as to sums and times of payment. The first one is ; " Granite Bank, Boston, April 18, 1841. Pay to W. Courtis & Co., 18 May, or bearer, seven hundred and three dollars and 50-100. Ephraim Brown, by J. W. Green. To the Cashier." The second is dated on 18th of April, and is to " Pay to W. Courtis & Co., 10 June, or bearer, seven hundred and seventy-six dollars 52-100." Signed in the same manner, and addressed in the same way " To the Cashier " of the Granite Bank. No one can doubt, that it is entirely competent for the parties to agree, that an instrument shall be treated to all intents and purposes as a check, and to have all the attributes and incidents thereof, and to declare, that it shall not be deemed a bill of exchange. In fact, by the forms here adopted, the parties do so declare ; and, as I understand it, the banks uniformly act upon this understanding, and always pay such checks upon the day fixed for payment, without any allowance of grace, if they have funds ; and this is done without any suspicion, that it is a misuser or misapplication of the funds of the drawer.

I am aware of the case of *Brown v. Lusk* (4 Yerger R. 210), in which it was held, that a check, drawn in Nashville, on the Branch Bank of the United States at Nashville, on the 13th of December, 1827, payable to A. B., or bearer, on the 14th of January following, was held to be an inland bill of exchange, and entitled to the days of grace. This case was decided in the absence of Mr. Chief Justice Catron ; and not only was no authority cited for the position ; but the very citation from Chitty on Bills, which was relied on to support it, distinctly shows, that there is a marked distinction between

checks and bills of exchange. Mr. Chitty there says :¹ "They (checks) are not due before payment is demanded, in which they differ from bills of exchange and promissory notes, payable on a particular day." Now, the most, that this position proves, is that checks are not governed in all cases by the same rules as bills of exchange and promissory notes. They are not payable until presentment. But how does this show when they are presentable; or that they may not be made payable on any other day certain than the day of the date? Or that days of grace are to be allowed upon them, if payable on a day certain? The learned judge, who delivered the opinion of the Court in *Brown v. Lusk*, added: "They (checks) are appropriations of money in the hands of a banker, and are payable on presentment." In this remark he but followed out what was intimated by Lord Kenyon in *Boehm v. Sterling* (7 Term R. 423, 429), and has been since often recognized as sound law.² But we all know, that, at law, neither a bill of exchange, until acceptance, nor a promissory note, is any appropriation of the money of the drawer or maker in the hands of any one. In truth, a check is an instrument *sui generis*, and is construed exactly, as the parties intend it. It is supposed to be drawn upon funds in the hands of the bank or banker, and it appropriates the amount to the holder of the check. And I agree with Lord Kenyon in holding, that the drawer cannot honestly alter the state of his accounts with the bank or banker, so as not to leave in his hands sufficient to pay the check on the very day on which it is presentable and payable; for that would be a fraudulent misapplication of the appropriated funds.

The like distinction between checks and bills of exchange

¹ Chitty on Bills, p. 322, 7th Amer. edition; S. P. Chitty on Bills, ch. 11, p. 546, 8th London edit. 1833.

² *Cruger v. Armstrong* (3 John. Cas. s. 7, 9); *Conroy v. Warren* (3 John. Cas. 259).

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was stated by Mr. Justice Sutherland in *Murray v. Judah* (6 Cowen R. 490). He there said: "As a general rule, therefore, a check is not due from the drawer, until payment has been demanded of the drawee, and refused by him. As between the holder of a check and an indorser or third person, payment must be demanded within a reasonable time. But as between the holder and maker, or drawer, a demand at any time before suit brought is sufficient, unless it appear, that the drawee has failed, or the drawer has in some manner sustained injury by the delay." The same doctrine has been fully recognised in other cases.¹ It is a natural, even if it be not a necessary, consequence of the fact, that a check is an appropriation of the funds of the drawer in the hands of the bank or banker to the amount of the check; and consequently, the drawer has no right to withdraw the same. And if the drawee, upon the presentment, refuses to pay the check, because he has no funds, then the drawer is not injured; and if he has funds, and refuses to pay, then, if the bank is still in good credit, as the drawer has sustained, and can sustain no loss, there is every reason to hold him liable therefor. Every check is *prima facie* presumed to be given for value received by the drawer; and if, by reason of the want of due presentment or want of due notice of the dishonor, he is to be totally exonerated, he pockets both the original consideration and his funds in the hands of the bank or banker. In such a case, can it be said, with truth or justice, that he is to be enriched at the expense of the holder of the check? Or, that he shall not be deemed to hold the money, as money had and received for the use of the holder, either because he had no funds in the bank, or because he still retains those funds, appropriated to the use of another, for his own use? I am aware, that Mr. Justice

¹ *Mohawk Bank v. Broderick* (10 Wend. R. 304, 306); *S. C.* (13 Wend. R. 133); *Cruger v. Armstrong* (3 John. Cas. 5); *Conroy v. Warren* (3 John. Cas. 259).

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Cowen, in his elaborate opinion in *Harker v. Anderson* (21 Wend. R. 372), has endeavored to support the opinion, that a check is to be deemed, to all essential purposes, to be a bill of exchange, and, therefore, that all the rules applicable to the latter are of equal force in relation to the former. Notwithstanding the array of authorities, so fully and learnedly brought forth by him in support of that opinion, my own judgment is, that they wholly fail of the purpose. It appears to me to be a struggle on the part of the learned Judge to subject all the doctrines, applicable to all negotiable instruments, to some common and uniform standard. I hope and trust, that such an effort will never prevail. In my judgment, it is far better, that the doctrines of commercial jurisprudence should, from time to time, adapt themselves to the common usages and practices and understanding of merchants, and vary with the varying courses of business, so as at once to subserve public convenience, and to mould themselves into the common habits of social life, than to assume any artificial forms, or to regulate by any inflexible standard the whole operations of trade and commerce. As new instruments arise in the course of business, they should be construed so as to meet and accomplish the very purposes, for which they were designed by the parties, and not to defeat them. Checks are as well known now as bills of exchange, as a class of distinct instruments in commercial negotiations; and he, who seeks to make them identical in all respects with bills of exchange, may unintentionally be introducing an anomaly, instead of suppressing one. Upon the whole, my judgment is precisely in coincidence with that of Mr. Chancellor Kent, already cited on this subject. I hold, that the instruments in the present case are strictly checks, and subject to all the incidents thereof; that they were payable on the very day, on which payment was upon their face demandable, without any days of grace; and that both parties intended throughout, that they

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should be treated as checks, and that they should be paid by the bank on the very day designated, or at any reasonable time thereafter.

But, assuming for the purposes of the argument, that this is not entirely correct, (which I maintain, however, to be entirely correct) still, in this case, in my judgment, the checks are a good debt against the bankrupt. And this for two reasons, either of which would be conclusive. In the first place, it is manifest, that these checks were drawn without the drawer having any right to draw. He had no funds in the bank at the time, when the checks were due and payable, or, indeed, for aught that appears, at any time since, to discharge them or either of them. Now, in the case of a check, I take it to be clear, that the drawer impliedly engages, that at the time, when the check is due and payable he has, and will have then, and at all times thereafter, sufficient funds in the bank to pay the same, upon presentment; and by the draft he appropriates those funds absolutely for the use of the holder. Now, the bank is not bound to pay, unless it is in full funds; and it is not obliged to pay, or to accept to pay, if it has partial funds only; for it is entitled to the possession of the check on payment; and, indeed, in the ordinary course of business, the only voucher of the bank for any payment is the production and receipt of the check, which the holder cannot safely part with, unless he receives full payment, nor the bank exact, unless under the like circumstances. The holder is not bound to accept part payment, even if the bank is willing to pay in part; for he has a claim to the entirety. Now, the circumstance, that the drawer had no right to draw these checks, and had no funds there at any time to pay the same, seems to me decisive, that he has no right to complain of the want of due presentment, or of the want of due notice. Not of the want of due presentment; for the checks were demandable, not merely on the days on which they were respectively

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due, but, as against him, at any reasonable time afterwards ; and he ought to have had funds at all times in the bank to pay the checks after they were due. Not of the want of notice ; for as he never had any funds in the bank to pay the checks, he had no right to believe they would be paid, and, strictly speaking, his conduct was an actual or constructive fraud upon the holders. In both views, the case of *Conroy v. Warren* (3 John. R. 259), is a direct authority to the purpose. And it may be further added, that it was held in that case, in which I entirely concur, that if the drawer sustains no damage by want of due presentment or due notice, and the non-payment of the checks arise from his own default, or from his want of funds, he is liable to the holder to the full amount of the checks. If the bank had funds, and had failed in the intermediate time, that might have furnished a different ground for defence. It would then be like the case of a note or acceptance, payable at a bank, where the bank had, at the time, funds to pay, and had failed, after it became due, and there had not been a due presentment for payment. It appears to me equally clear, upon principle and authority, that the drawer is liable in all cases for the dishonor of checks, whether they have been duly presented or not, or whether he has had due notice of the dishonor or not, in all cases where he has sustained no damage on account of the omission.

But it is said, that, in cases of bills due presentment and due notice are necessary whenever the drawer has any funds in the hands of the drawee ; and the same reasoning applies to cases of checks. Now, I deny both the premises and the conclusion. In the first place, as I understand it, the true doctrine is this, that, if the drawer has a right to draw, in the belief, that he has funds, or in the expectation that he shall have funds at the time of the presentment for acceptance, by reason of arrangements with the drawee, or putting his funds *in transitu* ; then and in such cases he is entitled to

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due notice. But according to the doctrine now contended for, if the drawer knows, that he has but one dollar in the hands of the drawee, and he has no expectation of any more being added, and has no right to believe, that a bill for more will be honored, he may nevertheless draw a bill on the drawee for ten thousand dollars : and if it is dishonored (as he knows it will be) he is still entitled to strict notice ; whereas, if he had not the one dollar in the drawee's hands, he would not be entitled to any notice at all. Now, I do not understand the law to involve any such strange anomaly, not to call it an absurdity. In each case, the same reason applies ; the draft is a fraud upon the holder ; and in each case a meditated fraud shall not be sheltered behind a rule intended to protect the innocent and trustworthy.¹ The two cases relied on at the bar to establish the opposite doctrine turn upon the very considerations, which I have already suggested. In *Hammond v. Dufrene* (3 Camp. R. 145), the bill was drawn by the party having no funds at the time ; but the drawees accepted the bill, and afterwards, and before the bill became due, the drawer paid a larger sum on account of the acceptors ; and Lord Ellenborough held, that the drawer was entitled to strict notice of the dishonor, when the bill became due. Why ? Because the drawer had a reasonable expectation, that the bill would be accepted (and it was accepted), and that it would be paid at maturity by the acceptors, as he was then in advance for them to a larger amount. In *Thackeray v. Blakett* (3 Camp. R. 163), the two bills drawn were accepted, and were dishonored at their maturity by the acceptors ; but due notice thereof was not given to the drawer. The bills were, in fact, drawn for the accommodation of the drawer ; but before they became due, he had contracted engagements on account of the acceptors to the amount of about 1000*l.*, the bills

¹ *Bickerdike v. Bollman* (1 Term R. 405).

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amounting to upwards of 3600*l*. Lord Ellenborough held the drawer entitled to strict notice ; but it was upon the ground, that there was an open account between the parties, and, therefore, the drawer could not necessarily have been aware beforehand, that either of the bills would be dishonored ; so that the case was put upon the clear ground, that the drawer had a right to draw, and had a right to believe, that his drafts would be honored. Indeed, in cases of a fluctuating balance between the parties, this may well constitute a ground upon which, without knowing the exact state of the balance, the drawer may reasonably draw. And this is the very ground, upon which the doctrine was put in the case of *Orr v. Maginnis* (7 East, R. 358), where the Court thought, that in cases of a shifting balance, notice was necessary, because the drawer could not, or might not know, that he was drawing without any right to draw.¹ The same doctrine was upheld in *Legge v. Thorpe* (12 East, R. 171), and was there expounded upon the principles, which I have stated.

In the next place, independently of the ground already suggested, there is another one, which in my judgment would be decisive of the whole merits of the case. It is, that there was an express waiver, on the part of Brown, of due presentment and of due notice of the dishonor of the checks, and indeed a request, that they should not be presented when due and payable, as there would be no funds in the bank to meet them. It is true, that this waiver and request were not made by Brown personally ; but they were made through the instrumentality of his general agent, Green. I say his general agent, for such, upon the evidence, he clearly appears to have been : and he was duly authorized by Brown to draw checks on the Granite Bank in his name ; and this would incidentally clothe him with full authority to make any arrangements, with

¹ See also Chitty on Bills, ch. 8, p. 358, 8th edit. 1833.

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reference to the presentment of the checks, for the benefit of his principal. But it is not necessary to put the case upon this narrow ground. It seems clear, that Green was not only the general agent of Brown in his business, which would confer on him this incidental authority; but in point of fact, that he transacted "almost all the business, that was done for him."

Passing from these grounds, either of which would alone dispose of the case, let us now proceed to the consideration of the facts presented upon the petition. It there appears, that these checks were, in fact, given to the Messrs. Courtis, as collateral security for a promissory note, made by them, payable to Brown or order, for the sum of \$1450, in four months, at his request, and for his accommodation. That note was discounted for the benefit of Brown at the Grand Bank in Marblehead, and not being paid by Brown at its maturity, it was paid by the Messrs. Courtis to the bank. Here, then, is a clear case of money paid at the request and for the use of Brown; and it is recoverable from Brown's estate as a debt, unless some legal discharge thereof has occurred. Now, the only pretence to allege a discharge is, that the checks above stated have not been duly presented, or due notice given thereof, and therefore, that the drawer is discharged therefrom. Assuming this to be true, and that no action would lie by the holders on these checks against the drawer, what answer is that to the claim for the money paid for the drawer on the promissory note, discounted at the Grand Bank? That is an independent debt, not growing out of the check, but collateral to it. Besides; I understand the true doctrine to be, in all cases where the notes or bills of third persons are taken as collateral security for a debt or indemnity, that the party receiving them is a mere bailee to collect the amount, and like other bailees, where the bailment is for the mutual benefit of the creditor and the debtor, that the bailee is bound only to or-

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dinary diligence for the collection ; and therefore, unless some loss has accrued to the bailer, by reason of the want of ordinary diligence in the collection, the bailee is not liable ; and his rights as a creditor remain unchanged. This rule is frequently applied in cases of notes and bills of exchange of third persons, taken from the debtor without his indorsement thereon, and also in cases of guaranty. The debtor must show, that he has sustained some loss or damage by the omission to collect the notes or bills, or by the want of due presentment, or due notice of the dishonor of them.¹ The rule would seem equally to apply to all cases, where, although the debtor should indorse such notes or bills, yet at the time of the indorsement he knew, or had reason to believe, that they would not and ought not to be paid ; for then the indorsement and delivery of the notes or bills would be a mere fraud or imposition upon the creditor.² If this would be true in the case of the notes or bills of third persons, it must, *a fortiori*, be true in relation to a check, drawn by the very debtor himself, on a bank, where he has no funds, or none but nominal funds, utterly inadequate to pay the debt, and which he knows, therefore, must be dishonored. Any other doctrine would allow the drawer to take advantage of his own gross laches, or gross fraud. In the present case, the drawer would thereby retain in his own hands the amount of the checks, for which he had received a full consideration ; and he would escape the re-payment of the very money paid for him in good faith by the Messrs. Curtis, without his having sustained any loss or damage by the non-presentment of the checks or the want of due notice of the dishonor. A more inequitable de-

¹ Story on Bills of Exchange, s. 372 ; Chitty on Bills, s. 372 ; Chitty on Bills, ch. 10, p. 474, 8th edit. 1833 ; *Id.* p. 529 ; Bayley on Bills, ch. 7, s. 2, pp. 286 to 290, 5th edit. 1830 ; *Oxford Bank v. Haynes* (8 Pick R. 423, 428).

² *Farmer's Bank v. Faumeter* (4 Rand. R. 253).

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fence against a just debt can scarcely be imagined. It is precisely what a Court of Equity would feel itself bound to redress by the fullest exercise of its powers, by granting full relief to the petitioners, for the amount of the debt paid by them for Brown.

Upon the whole, my judgment, upon all the questions in the case, is in favor of the petitioners; and I shall accordingly direct it to be certified to the District Court, (1) Upon the first question, that the proof of the debt of the Messrs. Courtis ought not to be expunged, but ought to stand as good and valid. (2) That the petitioners (the Messrs. Courtis) are entitled to be relieved in equity to the full amount of the debt proved by them, for which the checks in the case were given by the bankrupt.

WILLIAM BROOKS v. EZEKIEL BYAM AND OTHERS.

A PATENTEE of friction matches, by a deed under seal, undertook as follows: "to grant, bargain, sell, convey, assign, and transfer to B. his executors, administrators, and assigns, the right and privilege, hereinafter mentioned, of making, using, and selling the friction matches," patented, and to have and to hold "the right and privilege of manufacturing the said matches, and to employ in and about the same six persons, and no more, and to vend the said matches in any part of the United States." *It was held*, that this was a license or authority from the patentee, and need not be recorded in the Patent Office, under the Patent Act of 1836, ch. 357, s. 11.

A license need not be recorded in the Patent Office, unless there be some positive provision of the Patent Act, which renders it an indispensable prerequisite to its validity.

The recording within three months, according to the statute, is merely directory; and any subsequent recording of an assignment will be sufficient to pass the title to the assignee, except as to intermediate *bond fide* purchasers, without notice.

The Patent Act of 1836, ch. 357, s. 11, provides for the recording of three kinds of assignments, and of no others: first, an assignment of the whole

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patent; secondly, an assignment of any undivided part thereof; and, thirdly, a grant or conveyance of the exclusive right under the patent within any specified part of the United States.

It was held, that the right granted by the above deed was a license or authority, coupled with an interest in the execution, to the grantee and six persons to be employed by him in making matches; that the right was an entirety, incapable of being apportioned or divided among different persons; that, therefore, an assignment by B. of a right to make as many matches as *one* person could roll up, was void.

Quære, if the license is not such a personal privilege, that the entirety cannot be assigned, notwithstanding it was given to B. and *his assigns*.

The general rule of the common law is, that contracts are not apportionable; and this rule seems ordinarily, though not universally true, where the apportionment is by the act of the party, and not by mere operation of law; or where the contract is only in part performed, and is not in its own nature severable.

Quære, if by the maritime law the contract in the case of *Cutter v. Powell* (6 T. R. 320) was not divisible.

No apportionment or division of a license or privilege can be made, if it be contrary to the true intent of the parties thereto.

Quære, if an owner grant to A. the privilege of cutting timber off his land, with the assistance of four men employed by him, can A. sell the license and right of employment to the extent of one man's share?

An authority to A. cannot be assigned or executed by B. *A fortiori*, it is not apportionable, so that a part may be executed by B., and a part by C., and a part by D., and the residue by A.

BILL in Equity for an injunction and for relief. This is the same case, which has already been before the Court on an interlocutory motion (*ante*, 1 Story R. 296). It also relates to the same patent, which formed the subject of inquiry in *Ryan [Byam] v. Goodwin* (*ante*, 3 Sumner R. 514).

The bill states, that one Alonzo D. Phillips obtained letters patent for the making of friction matches; that he sold six rights therein, that is, the right to employ six persons at the same time, in the manufacture of the said matches, to one John Brown; and that Brown sold one such right to the plaintiff; but that the deeds of conveyance, both to Brown and the plaintiff, were not recorded in the Patent Office. It also states, that the defendants, claiming to be the sole assignees of Phillips.

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by a deed of conveyance, bearing date July 20th, 1838, from him to Byam, and from Byam to the other defendants, but of later date than the deed to the plaintiff, had commenced a suit against him, in the Circuit Court of the United States, for the District of Massachusetts, for an alleged invasion of their said right; the plaintiff averring, that he has done nothing therein not granted to him by the deeds from Phillips to Brown, and from Brown to him.

The bill further alleged, that at the time of the assignment from Phillips to Byam, and before delivery of the deed, the said Byam and the other defendants, knew, or had good cause to know, of the said conveyances from Phillips to Brown, and from Brown to the plaintiff.

Evidence was taken, tending to show knowledge on the part of the defendants, as alleged in the bill; but the case was argued on other grounds.

The following are the conveyances from Phillips to Brown, and from Brown to Brooks, the plaintiff:

“Copy of Assignment from John Brown to William Brooks.—An agreement made this eighteenth day of September, A. D. 1837, by and between John Brown, of Fitchburg, of the one part, and William Brooks, of Ashburnham, of the other part. Witnesseth—

“That the said Brown, in consideration hereinafter mentioned, agrees to sell and convey unto the said Brooks a right of manufacturing friction matches according to letters patent granted to Phillips and Chapin of Springfield, in said town of Ashburnham, to the amount of *one right*, embracing one person only so denominated in as full and ample a manner to the extension of the said one right, as the original patentee. And the said Brown further agrees, to go to Ashburnham and assist the said Brooks in learning the art and mystery of manufacturing said friction matches for the term of two days, and also to furnish from his, the said Brown’s establishment in

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Fitchburg, one girl, acquainted with said manufactory, to instruct other girls in said Brooks's employment in the said art and mystery of folding and binding up said matches for the term of two weeks. Also the said Brown further agrees with said Brooks, not to sell any right of manufacturing said friction matches, or of vending the same to any person living or intending to manufacture or vend said matches within forty miles of said Ashburnham.

" And the said Brooks on his part agrees with said Brown, upon condition, that the said Brown keeps and truly observes all and each of his agreements aforesaid, to pay him, the said Brown, the sum of fifty dollars in six months from this date.

" And it is mutually agreed between the parties, that if it should turn out upon legal investigation, which is now in progress, that said Phillips's and Chapin's patent right is invalid and of no effect in law, then said Brooks is not to pay said Brown any part of the said sum of fifty dollars, but only the reasonable expenses for the services of the said Brown, and the girl for the term aforesaid.

" JOHN BROWN.

" WILLIAM BROOKS.

" Witness,

" EDMUND SANDERSON.

" JOSEPH MERIAM.

" September (), 1837.

" Renewed the said Brooks's note for the sum of twenty-five dollars to this agreement.

" Patent Office.—Received and recorded, Liber D. of Transfers of Patent Rights, page 96. July 15th, 1839.

" HENRY L. ELLSWORTH,

" Commissioner of Patents."

" Copy of Assignment of Phillips and Brown. — Know all men by these presents, that I, Alonzo D. Phillips of Spring-

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Brooks by the patentee was an entirety, and incapable of being divided. It was transmissible, but not apportionable.

The Court then requested *Sumner* and *Greenleaf* to confine their argument to this last point.

The argument for the plaintiff was as follows: The ancient rule of the common law was, that a *contract could not be apportioned*. The reason of this was expressed by Holt, C. J., in *Hawkins v. Cardell* (1 Salk. 65), where he said, "where a man's contract has subjected him *only* to one action, it cannot be *divided*, so as to subject him to *two*." Finch says, "the duty growing upon a contract cannot be *apportioned*."¹ The rule seems to have been of the same class with the rule prohibiting the assignment of a *chose of action*; and also prohibiting *maintenance*. Both of these, in various ways, have lost much of their original stringency. Choses in action, through the intervention of Equity, are now assignable; and the commissioners for the reform of the criminal law in England, in their seventh report, recently offered, class *maintenance* among the offences, "the policy of retaining which is at least doubtful." — *Law Magazine*, No. 61, p. 3. The same policy, which has gradually restrained the ancient rules in the two last cases, would bear in restraint of the rule against the *apportionment of a contract*.

But even in the earliest times this rule was *very much restrained*, or rather, received a very limited application.

Let us consider first the cases to which the rule was applied.

Apportionment did not take place in the following cases: (1). *Debt*. Brooke, Abr. Apportionment, pl. 17; 3 Viner, Abr. Appt. A. § 7. (2). *Contract*. 3 Viner, Appt. § 11.

¹ See Finch's Law, book ii. cap. 18.

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which the parties have introduced. It construes an instrument so as to give reasonable effect to all the words ; *ut res magis valeat quam pereat*. Lord Bacon has expressed the rule on this subject in distinct words. *Verba aliquid operari debent, verba cum effectu sunt accipienda*. Maxims of the Law Regula, III.

But if it should be doubted whether effect is to be given to this word "*assigns*," and further, whether the deed is capable of *division*, then we rely upon another rule of interpretation, which is adapted to a case like this. *Verba fortius accipiuntur contra proferentem*. Lord Bacon has clearly pointed out the reason of this rule, and the cases, which will justify its application. Maxims, Reg. III.

The argument for the Defendants was as follows : It is a mistake to call this *property* in any sense, which is decisive of the question. It is not an assignment of any part of the patent right, as the grant of it in no degree abridges the remaining right in the hands of the patentee. It is not classed among assignments in the patent act. It needs not to be recorded, and the licentiate can maintain no action in his own name. It is a valuable right, and in no other sense is it property ; but rights are not dividible, because they are valuable. It is strictly a permission to do that, which none but the patentee can do without his consent. The right to make, does not imply the right to sell that privilege, much less to sell six privileges, where only one was granted.

Such is not the compact made between the parties : it is an executory contract, or, at least, a continuing contract, and not in the nature of a grant of property. Property, once conveyed, without any peculiar restriction, is as completely at the disposition of the grantee, as it was at that of the grantor ; but that right, which consists in the liberty of continuing to do a thing, must be taken and used as it is given. The

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grantee of the power cannot vary or add to the terms of the contract. The case falls precisely within that class of "authorities" which, according to the cases cited on the other side, cannot be apportioned. The authority given by a sheriff to his deputy, according to the case in Hobart, is not more strictly a new authority than that of a license by a patentee, which conveys to the grantee no portion of that exclusive right, which the patentee derives from his patent. It is asked whether the vendee of a patented machine may not sell it with the implied right of using it. Certainly he may: because the machine is property, in the strict sense of the word; and the right of using it is but appurtenant to the possession. Upon a similar distinction proceeds that class of cases, in which the right of common is held to be divisible, because it is appurtenant to land, which is itself divisible, and so the man, who bought six patent machines, bought therewith the right of use appurtenant to each, and could, therefore, sell them each with the right annexed.

If I may be permitted to use the expression, the fallacy of the argument on the other side consists in treating this contract as a sale of as many matches as six girls can roll up; thereby making the right of manufacturing a mere appurtenant to the principal grant; like the cases put of a sale of as many bricks from a yard as two horses can haul, &c. In all these cases it is a sale of clay, timber, or wood, with a right to take it from the vendor's land, and this brings them within the reason of the cases of common rent, and other things issuing out of land, where the principal thing is a divisible property, and the appurtenance follows the principal; but the present case contains no contract of sale of the matches, nor of any of the materials, of which they are composed; it is simply a license to Brown to take his own wood, phosphorus, chalk, glue, and brimstone, and make them up into matches according to the vendor's patent; it is a mere power, coupled

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indeed with an interest, and, therefore, not revocable. There is something of a personal trust in the contract, as the vendor might prefer to trust one man rather than another with a power so likely to be abused. Perhaps the use of the word *assigns* in the deed, though of no force at law, if the thing be not assignable, might protect an assignee of the whole in Equity. But it is unnecessary to pursue this inquiry, because there are no words in the deed contemplating a division. It is not agreed, that by a fair interpretation of the license, Brown could establish six manufactories in six different places. The license provides that Brown shall not manufacture in any place within forty miles of Methuen. This shows the place of manufacture was thought of some importance, although the right is given to vend in any part of the United States; but supposing such a right to exist, it is by no means true, that the same inconvenience would follow from it to the patentee, as from the establishment of six independent manufactories. The patentee would thereby lose the responsibility of the person with whom he contracted for the conduct of his subordinates, though perhaps the same evil to a less extent might result from the general assignability of the contract.

But no answer has been given to the more weighty objection urged at the bar, and that is, that by this subdivision six competitors with the patentee are brought into the market instead of one, each with the power, and under the obvious temptation, to undersell the other in a manufacture, in which the materials cost almost nothing, the consumption is almost unlimited, and the profit very great. We think this decisive, and that Mr. Phillips and his assignee may well say, that they have made no such contract with Brown.

As to the point, that if Brooks took no legal title he ought, at least, to be protected as an equitable assignee, it is obvious that this construction would leave the patentee and his as-

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signees exposed to all the disadvantages of a legal title in Brooks. The cases of *Dunlap v. Stetson* and *Moody v. Towle* (4 Mason, 349; 5 Greenl. 415), cannot be applied to this; for in those cases the thing divided was of a divisible nature, although the note, the evidence of the debt, was not.

The following cases were cited by the counsel for the defendant: *Robson v. Drummond* (S. B. & Ad. 303); *Planche v. Coburn* (5 Car. & Payne, 58); *S. C.* (8 Bing. 14); *Hall v. Gardner, et. al.* (1 Mass. R. 172); *Davis v. Coburn* (8 Mass. R. 299).

STORY, J. — The question, which seems originally to have been one of the main hinges of this controversy, and to which, as a matter of fact, so much of the evidence is addressed, is, whether Byam, at the time of the purchase of the patent right of Phillips, which was subsequent to the license granted by the patentee to Brown, had notice of the license so granted to Brown. That point becomes wholly immaterial, if the license itself is not by law required to be recorded. And independent of the admission of counsel, I am entirely satisfied, upon the true construction of the Patent Act of 1836, ch. 357, § 11, that such a license is not required by law to be recorded in the Patent Office, in order to give it effect and validity. In this view of the matter, I adopt throughout the argument of the learned counsel, who opened the cause for the plaintiff. My reasoning upon the point is briefly this. The license is not *per se* required to be recorded, unless there be some positive provision of the Patent Act, which renders it an indispensable prerequisite to its validity and obligation. There is no other act in force, requiring any assignment of any patent right to be recorded, except the act of 1836; and the eleventh section of that act is in these words: "That every patent shall be assignable in law, either as to the whole interest, or

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any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of the exclusive right under any patent to make and use, and grant to others to make and use, the thing patented within and throughout any specified part or portion of the United States, shall be recorded in the Patent Office within three months from the execution thereof, for which the assignee or grantee shall pay to the commissioner the sum of three dollars."

I have already, in other cases, had occasion to decide, that the recording within three months is merely directory, and that, except as to intermediate *bona fide* purchasers, without notice, any subsequent recording of an assignment will be sufficient to pass the title to the assignee. Now, as has been well observed by the counsel for the plaintiff, three cases only of the recording of assignments are provided for in the foregoing section; first, an assignment of the whole patent; secondly, an assignment of any undivided part thereof; and, thirdly, a grant or conveyance of the exclusive right under the patent within any specified part or portion of the United States. The present case falls not within either predicament. It is not a grant of any exclusive right; but at most the grant of a right or privilege of manufacturing matches under the patent in any place not within forty miles of Methuen, and to vend them in any part of the United States, concurrently with the patentee and any other grantees under him. It is, in no sense, therefore, an exclusive right. It is not an assignment of the patent itself, or of any undivided part thereof, or of any right therein limited to a particular locality. In truth, in propriety of language, it is strictly a license or authority from the patentee to Brown to make and vend the matches, without giving him any exclusive right except as to the matches he shall manufacture, exactly as the sale of a patented machine by the patentee would give to the purchaser the right to use the same, without in any manner restricting the patentee in his right to grant or

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sell other similar machines to any other persons for use. The language of the instrument of conveyance to Brown by the patentee, is that he doth "grant, bargain, sell, convey, assign, and transfer to him, the said Brown, his executors, administrators, and assigns, the right and privilege hereinafter mentioned of making, using, and selling the friction matches" patented, and to have and to hold "the right and privilege of manufacturing the said matches, and to employ in and about the same six persons, and no more, and to vend said matches in any part of the United States." Then comes the proviso, that nothing herein contained shall prevent or restrict the patentee from "making and vending the same, or of selling and conveying similar rights and privileges to others;" and a further proviso, that "the said Brown shall not manufacture the said matches in any place within forty miles of Methuen." It seems to me, that this language admits of no other rational interpretation, than that, which I have already put upon it. My judgment accordingly is, that no recording of this instrument was necessary to give it complete validity; and therefore the question of notice thereof by Byam, at the time of his purchase, becomes unnecessary to be decided.

The other question as to the indivisibility of the license, granted to Brown, involves considerations of more nicety and difficulty. By the agreement between Brown and Brooks (18th of September, 1837), it was agreed by Brown to sell and convey unto Brooks "a right of manufacturing friction matches according to letters patent, granted to Phillips, &c. in the said town of Ashburnham, *to the amount of one right*, embracing one person only, so denominated, in as full and ample a manner to the extension of the said one right as the original patentee;" and Brown further agrees "to go to Ashburnham and assist Brooks in learning the art and mystery of manufacturing such friction matches, &c. &c.;" and, also, "not to sell any right of manufacturing said friction matches, or of vending

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the same to any person living, or intending to live, to manufacture or vend, said matches within forty miles of said Ashburnham." The question, then, is, whether the license or privilege granted by the patentee to Brown is not an entirety, and incapable of being split up into distinct rights, each of which might be assigned to different persons in severalty. I do not meddle with another point, and that is, whether the entirety of the license or privilege to Brown was capable of being assigned, though if it were intended to be a personal privilege or license, it might open a ground for argument, notwithstanding the use of the word "assigns." That point does not arise in the present case; for here the whole license or privilege is not sold or assigned; but one right, embracing one person only. It has been well said, that the right or license may be transmissible, although not apportionable. There is some obscurity in the language of the instrument, which makes it somewhat difficult to give a definite interpretation to it. Brown's privilege or license is at most to himself and his assigns, and "to employ in and about the manufacturing of the matches six persons, and no more." Brown agrees to sell to Brooks "one right, embracing one person." Now, the privilege or license to Brown (assuming it to be capable of assignment) is to him, and to his assigns, to employ six persons. Whoever is employed is to be employed by Brown and his assigns. It would seem to be a reasonable interpretation of this language to say, that all of these persons should be employed by one and the same party, either all by Brown, or all by his assigns. But the sub-agreement with Brooks conveys to him one right in severalty, embracing one person, that is, (as I understand it), the right to employ one person in the manufacture of the matches. So that, if this agreement be valid, then the original privilege or license, granted by the patentee to Brown, upon this construction, includes six distinct and independent rights, each of which may be granted to a different

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person in severalty. Now, I must confess, that such a construction is open to all the objections stated at the bar. It exposes the patentee to the competition of six different distinct persons, acting in severalty, and independently of each other. It may make an essential difference to the patentee in his own sales, whether the whole of the right or privilege granted to Brown be in the possession of one, or more persons, having a joint interest, and of several persons, each having a separate and independent interest. The danger too to the patentee of an abuse or excess of the right or privilege granted by him is materially enhanced by the circumstance, that each of the subholders may be acting at different places at the same time, and the nature and extent of their claim and use of the right or privilege may be difficult for him to ascertain, and leave him without any adequate remedy for any such excess or abuse of it. The language ought, in my judgment, to be exceedingly clear, that should lead a Court to construe an instrument of this sort, granting a single right or privilege to a particular person or his assigns, as also granting a right or license to split up the same right into fragments among many persons in severalty, and thus to make it apportionable as well as transmissible. The patentee might well agree to convey a single right as an entirety to one person to manufacture the matches and employ a fixed number of persons under him, when he might be wholly opposed to apportioning the same right in severalty among many persons. I observe, that the parties are admitted, both by the evidence and at the bar, to have adopted, and to be willing to abide by, a construction of the grant to Brown, which I confess, I should hardly have arrived at by an examination of the words of the instrument. That construction is, that the grant to Brown, was to manufacture as many matches as six girls could roll up in a day; and that as many other persons might be employed by him to prepare the work, as might be necessary to accomplish this

end. (See Printed Record, p. 20, 64, 125). But the employment of six girls by one or more persons holding the entire right, might be very different in the effect upon the value of other rights, grantable by the patentee, from what it would, or might be, if there were six separate owners, each entitled to employ one girl, with all the proper auxiliaries.

There are many rights and privileges, which are grantable, but which, at the same time, are not assignable. And the rules on this head are founded, sometimes upon the consideration of the nature and objects of the grant, and sometimes upon a supposed personal confidence, and sometimes upon the apparent inconvenience of allowing an assignment. Some of the cases on this subject will be found collected in Com. Dig. Grant D., and Assignment, C. 1. Even transmissible rights are not always severable or apportionable. Of this, several illustrations may be found in Coke on Litt., 164*b*, 165*a*, and Com. Dig. Parcener, A 2.

But what is more immediately to our present purpose, there are many rights, which, although assignable as an entirety, are not apportionable or divisible by assignment. Thus, for example, it is said in Com. Dig. Grant D., that if A. hold three acres by fealty and rent, and the Lord grant the services of one of the acres, it is void; for he cannot make severance of the tenure. And the same doctrine is laid down by Perkins (Grant, 67), and by Littleton, J. in the Year Book, 7 Edw. 4, 25. The like rule is laid down in Comyns Dig. Grant, D. and in Perkins, Grant, 68, where three jointments hold, and the Lord grants the services of one of them unto a stranger; for the grant is void for the like reason.

But the case of Lord Mountjoy, reported in Godbolt R. 17, Moore R. 174, and more fully upon some points in Anderson R. 307, approaches by a very near analogy to the present case. There, Lord Mountjoy granted by indenture a certain manor to one Browne in fee, and there was a proviso in the

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indenture, and a covenant by Browne, that Lord Mountjoy, his heirs, and assigns, might dig for ore in the lands parcel of the manor, and dig turf also, for the purpose of making alum. Lord Mountjoy demised his interest for a term of years to one L., and L. assigned over the same to two other persons; and among other questions, one was, whether Lord Mountjoy could assign over this right, and if the subsequent assignment to the two were good. Godbolt says, that it was decided by the judges, that the assignment to the two was good; but that the two assignees could not work severally, but together with one stock, or such workmen as belonged to them both. Lord Coke, who was counsel in the case for Lord Mountjoy, and who reported to the Privy Council, where the question arose, the opinion of the judges, confirms in Co. Litt. 165*a* the report of Godbolt, and says, that the judges, among other things, resolved, "That the Lord Mountjoy might assign his whole interest to one, two, or more; but then, if there be two or more, they could make no division of it, but work together with one stock; neither could the Lord Mountjoy, &c. assign his interest in any part of the waste to one or more, for that might work a prejudice and a surcharge to the tenant of the land." And, therefore, Lord Coke adds, if such an uncertain inheritance descendeth to two partners, it cannot be divided between them. It is true (as Mr. Butler in his Note, Co. Litt. 165*a*, note (1), has observed) that Lord Anderson's Report takes no notice of the point of indivisibility, nor is it contained in the certificate, there stated to have been given by the judges. But that is quite consistent with Lord Coke's account of the matter, which does not merely refer to the certificate, but to the reasoning of the judges; and the point of indivisibility was certainly fairly open before the judges, in considering the subject. Lord Coke, from his position in the case, could scarcely have been mistaken upon so important a point, which went to limit, and not to enlarge, the rights of his client.

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Now, it seems to me, that, in this aspect, the case of Lord Mountjoy has a very striking application to the present case. The grant was of a mere right to dig ore, &c. ; and yet, upon the ground of possible or probable prejudice to the grantor (Browne) of this privilege, it was held to be indivisible.

A great many cases were cited at the argument by the learned counsel for the plaintiff, turning upon the general doctrine of apportionment, and the analogies furnished thereby to illustrate the present case. Some of those cases are exceedingly obscure ; others turn altogether upon principles of the feudal law, applicable to rent service, and other kindred tenures, since the statute of *Quia Emptores* ;¹ others again are cases of very doubtful authority, such as *Ardes v. Watkins* (Cro. Eliz. 637, 651), where the Court were at first divided, and Popham, Chief Justice, dissented from the final opinion ; and others, again, turn upon apportionments by operation of law, and independent of the acts of the parties. The general rule of the common law is, that contracts are not apportionable ; and this rule seems ordinarily, although not universally, true, where the apportionment is by the act of the party, and not by mere operation of law ; or where the contract is only in part performed, and is not in its own nature and terms severable.² The case of *Cutter v. Powell* (6 Term R. 320) is directly in point, although I entertain considerable doubt, whether, by the maritime law, the contract in that case was not divisible. In respect to rent, there are doubtless many cases, where, at the common law, it is apportionable by operation of law, when it could not be by the act of the parties.³ And in some cases also it may be apportioned even by the act of the party entitled thereto, as is shown in the cases put in Bacon's

¹ See Viner's Apportionment, b. pl. 1 ; Bac. Abridg. Rent, M. 1.

² See 1 Story Eq. Jurisp. s. 471, s. 472, s. 476, s. 480, s. 481.

³ Co. Litt. 147b, 148a, 148b, 149b ; Bacon Abridg. Rent, M. ; *Wotton v. Shirt* (Cro. Eliz. 742) ; Viner, Abridg. Apportionment, B.

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Abridgment, Rent M. 1.¹ But the grounds, upon which this is supported, are not always clearly stated or defined, or made consistent with each other. Thus, it is there said, that if I make a lease of three acres, reserving 3s. rent, as I may dispose of the whole reversion, so I may also of any part of it, since it is a thing in its own nature severable, and the rent, as incident to the reversion, may be divided too. This is intelligible enough ; but then it turns upon the very ground, that a reversion is severable ; and the very question raised in the case now before the Court is, whether this license is so severable or divisible. It is upon the like reason, that the case of *Ardes v. Watkins* (Cro. Eliz. 637, 681), is there attempted to be supported. In *Ewer v. Moyle* (Cro. Eliz. 771), the Court found great difficulty in allowing an apportionment of rent, where there had been a devise, and finally adjudged, " that there should be an apportionment, in regard it was not a division by the act of the party, but by the law, viz. the Statute of Wills ;" which seems a strange reason for the case, as the devise was clearly the act of the party. In Bacon's Abridgment, (Rent M. 1), it is said, that the law allowed of grants of rent-charge, and thereby established such sort of property, and it would be unreasonable and severe to hinder the proprietor to make proper distribution for the promotion of his children, or to provide for the contingencies of his family, which were in his view. If this be a good reason, it would carry the doctrine of apportionment to a vast many other cases, which it has never been supposed to reach. The case in Hobart's Rep. 235, where it was adjudged, that where one had a common appurtenant to ten acres of land for all his beasts levant and couchant on the land, and sold part of it, the common was apportionable, and every one should have common for his beasts levant and couchant upon his part, turned upon the

¹ See also Viner, Abridg. Apportionment, B.

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ground, that the right of common there was several in its nature, and is not so strict an entirety, as a warranty, a condition, &c. which cannot be divided by the act of the parties, which yet by act of law are divided. The same doctrine was applied in the case cited from Danvers's Abridgment, Apportionment B. 4, and to be found also in Viner's Abridgment, Apportionment B. pl. 19, and reported as the case of *Morse v. Well*, in 1 Brownlow R. 150, 2 Brownlow R. 297, and in *Morse and Well's* case in 13 Co. R. 65, upon the ground, that the common was severable, and belonged to each portion of the land rateably.

I have dwelt somewhat upon these cases of apportionment, because they were greatly relied upon at the bar in the argument. But I cannot say, that they have any very forcible application to the present case, because they are either distinguishable from the present case in their circumstances, or stand upon grounds of reasoning, often obscure, and subtle, and unsatisfactory; or because, admitting their authority, they proceed upon the ground, that, in general, apportionment is not allowed in contracts by the mere act of the party, although it may be by act of law; and therefore they rather stand as exceptions, than as illustrations of a general principle, to be applied by analogy to other cases. The cases of rent service are admitted by the authorities to stand upon a peculiar ground, resulting from the feudal law and feudal tenures, and are unquestionably exceptions to the general doctrine.

What I proceed upon is, that every conveyance of this sort must be decided upon its own terms and objects, and that it is very clear, that no apportionment or division of the license or privilege can be made, if it is contrary to the true intent and meaning of the parties in the conveyance.

It is said, that the present conveyance is the grant of an interest and right and property; and, therefore, it is divisible in its own nature. It is unnecessary to dispute about terms; but if

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I were called upon to characterize the present grant, I should rather call it an authority, or license, coupled with an interest in its execution. It seems to me, not so much a property or interest *in rem*, as a right of user for the benefit of the licensee. It is like a right of way granted to a man for him and his domestic servants to pass over the grantor's lands.

Many cases have been put at the argument to sustain the views of the counsel for the plaintiff. But in my judgment, they are all distinguishable from the present case ; and perpetually admonish us of the truth of the maxim, *Nulium simile est idem*. Thus, it is said, that if I buy as many bricks from a kiln as two horses can haul in an ordinary wagon, or as one mason can lay on the wall of my house in a day, it is a valid sale of the quantity of bricks when ascertained. Certainly it is ; but then it is a valid sale of the bricks as property, not the sale of the mere privilege to manufacture bricks at my kiln. So, it is asked, if the owner of a brick-yard sells to A. the right of making as many bricks on any land, as six men can strike in a day, whether it may not make a valid sale to a third person of all, that one man can strike ? Certainly he may ; but then he sells the ascertained quantity of bricks ; and not the right to make them. So, in the case at bar, Brown might well sell to any person or persons all or any undivided portion of the matches made by him under his license ; but that would be a very different thing from a sale of a fraction of the privilege to make them. The case of the sale of timber to be cut off lands in Maine, is of the same nature as those already stated. The sub parties purchase the timber when cut, not the privilege of cutting it. But, suppose the owner grants to A. the privilege of cutting timber off of his land, with the assistance of four men employed by him, can he sell the license and right of employment to each of four men in severalty for one man's share ? That would be very near the present case. But can we, by

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any straining, declare, that a license to A. to employ his four servants on my land, is a license assignable to B. to employ his four servants? Or if assignable, would A. have a right to assign the right to employ one servant to B., another to C., and another to D. in severalty? Now, that is the very hinge of the case at the bar. It was the very point in Lord Mountjoy's Case, in Godbolt R. 17. We all know, that an authority granted to A. cannot be assigned or executed by B. *A fortiori* it is not apportionable, so that a part may be executed by B., and a part by C., and a part by D., and the residue by A.

Upon the whole, I retain the opinion, that the license in this case was an entirety, and incapable of division, or of being broken up into fragments in the possession of different persons. The right granted is to the grantee and six persons to be employed by him in making matches; and if it be assignable, the assignment must be of the entirety of the license to the assignee, and it cannot be apportioned among different persons in severalty.

It has been suggested, that, whatever may be the case at law, the plaintiff has an equitable right, which the Court ought to enforce. The short answer to this is, that the plaintiff has no equity, as against Byam and the other defendants, to do an act, for which he had no authority, or to exercise a right never assignable to him. If he has any equity, it is against Brown, and not against the defendants.

The bill, therefore, must be dismissed; but the question of costs will be reserved, if the parties desire it.

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WHERE a demurrer might be put in to a bill in Equity, but, instead thereof, an answer is made, and the bill is dismissed on its merits, because the plaintiff does not show a sufficient title, the defendants are not entitled to costs.

Costs in Equity are in the sound discretion of the Court; but, in the ordinary course of practice, when a bill is dismissed, costs are not awarded to the plaintiff.

Under the circumstances of this case, *It was held*, that each party must bear his own costs, but that the expense of printing the record must be divided between them.

THIS cause came on to be argued again, upon the reserved question of costs.

C. Sumner and Greenleaf, for the plaintiff; *Franklin Dexter*, for the defendant, *e contra*.

STORY, J. — There is no question, that this Court had full jurisdiction of this suit. There are all the common ingredients to give jurisdiction in Equity. The difficulty lies not here; but it is, whether the title made by the plaintiff is of such a nature as to entitle him either to a discovery, or to relief, in Equity. I have already decided, that it is not such a title. The Court may have complete jurisdiction to grant a discovery or relief, if a fit case is made out for its interposition. But here the plaintiff fails in his preliminary step. He shows no sufficient title to enable the Court to act. The bill, therefore, must be dismissed as wanting merits. The objection might, indeed, have been taken by the defendants by demurrer, if they had chosen so to do. And, as this would have put an end to the case in its earliest stage, it furnishes a good ground, why the Court may refuse them costs for all the ulterior proceedings occasioned by the omission.

But it is a very different question, whether, when the plaintiff's bill is dismissed upon the merits of his title, he can claim costs. Certainly costs in Equity are altogether in the discre-

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tion of the Court. But then it is to be remembered, that this discretion is a sound one, to be exercised upon principle, and with a reference to the general rules of practice. In the ordinary course of practice, if a bill be dismissed, the most, that is done, is, in proper cases, to dismiss the bill without costs to the defendant. I do not say, that a case may not be put, in which the Court might go further, and allow costs to the plaintiff, even upon the dismissal. But it must be a very extraordinary case; such, for example, as where the defendant has, by his own fraud, in misrepresenting himself to be the proper and sole party to be sued, as executor, or heir, or devisee, induced, nay, invited the plaintiff, to bring the suit, and then has put in a plea, and established the fact, that he is not executor, or heir, or devisee. Such a case may exist, and for aught I know, the Court might, under such circumstances, award costs against the defendant, although the bill might be dismissed. But on this I give no opinion. The present is not such a case.

Certainly the plaintiff might, in some way, have taken the opinion of the Court upon the validity of his title at an earlier stage in the cause, if he had chosen, as he had notice of the objection before any evidence was taken, from the statements in the answer. In not doing so, he voluntarily incurred the hazard of taking the testimony. It is true, that the reason of the omission is sufficiently explained by Mr. Greenleaf's affidavit; but then from Mr. Smith's affidavit there seems to have been a mistake and misunderstanding between the counsel in the cause, which led to the present embarrassment.

Upon full reflection, my opinion is, that under all the circumstances of the case, each party must bear his own costs in the cause. But the printing of the record having been according to the order and rule of the Court, and being costs in the cause, it must be deemed to be for the benefit of both parties; and therefore I shall order the same to be equally divided between, and paid by, the parties.

EDWARD FLETCHER, AND OTHERS, '

v.

GEORGE MOREY, ASSIGNEE.

THE bill, in this case, asserted an equitable lien against certain shipments, and the proceeds thereof, in the hands of the assignee of James Read & Co. as security for advances made by the plaintiffs, under an agreement with James Read & Co. by which Read & Co. were authorised to make drafts on the plaintiffs in payment for merchandise, the said merchandise being pledged and hypothecated to the plaintiffs as collateral security for their advances. *It was held*, that the lien was good.

So, also, duties and charges upon the shipments having been paid by Messrs. Read & Co.; *It was held*, that they were not to be deducted from the value of the shipments, or the proceeds in the hands of the assignee, except in respect to such goods as came into the hands of the assignee, charged with those duties, since the bankruptcy.

The assignee in bankruptcy takes the property and rights of the bankrupt, subject to all the liabilities and with all the rights, that would attach to them in the hands of the bankrupt; the only exception is in case of fraud.

Where a lien, or equitable claim, constituting a charge *in rem*, is a matter of agreement, it will be enforced in equity, not only upon real estate, but also upon personal estate, or money in the hands of a third person; and against the party himself, or his personal representatives, or persons claiming under him, or assignees in bankruptcy.

The proviso in the second section of the Bankrupt Act of 1841, ch. 9, embraces all liens, equitable and legal, which are valid by the *lex loci contractus*, and is not restricted to such as can be enforced by State laws.

An equitable lien is valid by the laws of Massachusetts, although no remedy for its enforcement is provided by the State jurisprudence.

The Equity Jurisdiction and Equity Jurisprudence administered in the Courts of the United States are coincident and coextensive with that exercised in England, and are not regulated by the municipal jurisprudence of the particular State, where the Court sits.

Liens and mortgages of personal property are perfectly good, as between the parties, and against creditors, although the possession remain with the owner or mortgagor, if there be no fraudulent intent. The same rule applies to sales of personal property.

BILL in Equity brought by Edward Fletcher, James Alexander, Charles Kerr, Charles Dashwood Bruce, Christopher

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Pearse, and Charles Philip Fletcher, of London, England, merchants and copartners negotiating under the style and firm of Fletcher, Alexander & Co., bring this their bill against George Morey, of Boston, as assignee of the joint estate and effects of James Read & Co. The bill sets forth, in substance, that on or about the thirtieth day of December, 1840, James Read, of Boston, in Massachusetts, and Horace Hall, of Charlestown, in New Hampshire, merchants and joint partners negotiating at Boston aforesaid under the firm of James Read & Co., applied to Thomas B. Curtis, the duly authorized agent of the plaintiffs on that behalf, and requested him as the said agent, to grant unto them a letter of credit upon the usual terms and conditions, and thereupon the said Curtis being thereunto duly authorised, did grant unto them a letter of credit bearing date on the thirtieth day of December, 1840, addressed to the plaintiffs by their said partnership name and style, of which the following is a true copy :

“Boston, December 30, 1840. Messrs. Fletcher, Alexander & Co., London. Gentlemen: This letter will be forwarded to you by Messrs. James Read & Co., a firm of the first standing in this city. These gentlemen have orders now in progress of execution towards which they would like a credit with your good selves. Believing that I cannot introduce to you better correspondents, I hereby request that you authorise such parties as they may advise you, to draw on their account for sums not exceeding ten thousand pounds in all. Drafts drawn in payment for goods to be shipped after the reception of this letter to be accompanied by bills of lading, and merchandise so purchased and shipped from Liverpool to be forwarded through your house there. Your ob’t. serv’t, (Signed), T. B. Curtis. For £10,000.”

That at the same time, that the said letter of credit was granted, the said James Read & Co. entered into a contract in writing with the plaintiffs, of which the following is a true copy :

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“Boston, December 30, 1840. Received the original of the annexed letter of credit for ten thousand pounds, in consideration whereof, We, James Read & Co., do hereby agree with Messrs. Fletcher, Alexander, & Co. to provide in London, previous to the maturity of the bills, sufficient funds to meet the payment of whatever may be negotiated by virtue thereof, with commission on the same one per cent. and also to give security here for the same at any time previous thereto, if required by them or their agent, and all property, which shall be purchased by means of the above credit and the proceeds thereof, and the policies of insurance thereon, together with the bills of lading, are hereby pledged and hypothecated to them as collateral security for the payment as above promised, and held subject to their order on demand, with authority to take possession and dispose of the same at discretion for their security or re-imbursement. For all payments, settlements and recoveries in the United States, growing out of this credit, the pound sterling is to be calculated at the current rate of exchange, existing at the time of such settlement. Interest to be charged at the rate of six per cent. per annum. (Signed), James Read & Co.”

And the said James Read & Co. having signed the said contract, and delivered the same to the said Curtis, and having received from him the said letter of credit, proceeded to act thereon, and from time to time through their duly authorised agents in that behalf, drew bills on the plaintiffs in London, which were accepted and paid by them under the said letter of credit; and funds to pay the same were duly provided by the said James Read & Co. until the twenty-sixth day of March, 1841, when the said letter of credit having been altogether used and executed, and bills amounting to the sum of ten thousand pounds sterling, mentioned therein as not to be exceeded, having been drawn, the said James Read & Co. applied to the plaintiffs' said agent, and desired

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to renew or extend the said letter of credit and their said contract with the plaintiffs, so as to enable them to continue to use the said letter of credit, and thereupon, by mutual agreement between the said James Read & Co. and the plaintiffs' said agent, the following endorsement was made upon the said letter and signed by the plaintiffs' said agent, namely :

"Boston, March 26, 1841. It is agreed that this letter of credit shall continue in force for one year from its date, and for any sums not exceeding ten thousand pounds at any one time, unless sooner annulled.

T. B. CURTIS,

Attorney for Fletcher, Alexander & Co."

And at the same time the following endorsement was made on the said contract by the said James Read & Co. :

"Boston, March 26, 1841. The credit for which this obligation was given being extended per endorsement on the annexed copy thereof, we agree that the obligation shall be binding in like manner for such extension, say for any sum not exceeding at any one time ten thousand pounds sterling.

JAMES READ & Co."

That after the said letter of credit had been enlarged by the endorsement aforesaid, the said James Read & Co. proceeded to, and did authorise certain persons doing business under the mercantile firms of W. B. Huggins & Co., Crafts & Stell, and Knauth & Storrow, to purchase merchandise for them, and draw bills of exchange on the plaintiffs for the price thereof, and charges and expenses thereon, and having duly advised the plaintiffs thereof, and requested them to accept the same, they, pursuant to the said letter of credit extended as aforesaid, and relying on the said written contract of the said James Read & Co. and the hypothecation and promise of a specific lien therein contained, did accept bills of exchange

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drawn by the said mercantile firms, to pay for merchandise purchased by them for the said James Read & Co.

That the said James Read & Co. have wholly failed to comply with their said promise to the plaintiffs to provide in London previous to the maturity of the said bills of exchange sufficient funds to meet the payment thereof together with the plaintiffs' commission thereon, and on the twenty-third day of April, 1842, by a decree of the District Court of the United States, within and for the said District of Massachusetts, the said James Read & Co., upon their own petition, were duly declared bankrupts, and George Morey, Esquire, of Boston, aforesaid, was duly appointed their assignee; so that it is now wholly beyond the power of the said James Read & Co. and their assignee, to provide funds as aforesaid, nor do they, or either of them intend or expect so to do.

That of the merchandise purchased as aforesaid and paid for by bills of exchange drawn as aforesaid, some has already reached the hands and possession of the said James Read & Co., whereof some has been sold, and the proceeds thereof remain in their hands, or have come to the hands of their assignee, in the form of bills of exchange or promissory notes, or in some other form, so that the same can be identified and specified; and some thereof still remain in their hands, or the hands of their assignee, unsold. And some of the said merchandise so purchased and paid for, as aforesaid, having arrived in this country after the said James Read & Co. had become insolvent, and had filed their petition to be declared bankrupts, the plaintiffs' said agent applied to them in behalf of the plaintiffs, to perform their said contract by delivering to him the bills of lading of such property as had not yet been received by them, and thereupon the said James Read & Co. did endorse and deliver to the plaintiffs' said agent the bills of lading of merchandise, which the said James Read & Co. had then received. That of the said merchandise so

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purchased and paid for as aforesaid, the bills of lading of some part have come to the hands of said Morey as assignee, and of a part the bills of lading have not yet arrived, but the whole of the residue of the said merchandise is soon expected to arrive and to come to the hands of the said assignee.

That on or about the twenty-fifth day of March, 1842, the plaintiffs, by their said agent, applied to the said James Read & Co., and requiring of them that all property purchased by virtue of the said letters of credit, or the proceeds thereof, if sold, should be placed in the possession of the plaintiffs' said agent, for the plaintiffs' security, in compliance with the contract aforesaid, and the said James Read & Co. admitting that they were bound to do so by their contract aforesaid, did hand to the said agent an invoice of the said merchandise then remaining unsold, and also a list of all unsettled accounts of the sales of the said merchandise, which had been sold, but by reason of their having petitioned for a decree of bankruptcy as aforesaid, refused to permit the said plaintiffs' said agent to take possession of the said merchandise.

That the said Morey had actual notice before his appointment to the said trust, of the plaintiffs' lien on the said merchandise and bills of lading, and express and particular notice thereof very soon after his said appointment, and was requested to permit the plaintiffs to take possession thereof pursuant to their rights under the said contract of James Read & Co. with the plaintiffs, but the said Morey as such assignee refused and still refuses so to do.

The bill concludes with a prayer, that the Court will be pleased to declare, that the plaintiffs are justly entitled to and have a lien on all the said merchandise and the proceeds thereof, and the bills of lading therefor, as collateral security for the faithful performance by the said James Read & Co. of their said contract with the plaintiffs, or for such further and

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other relief as the nature of the case may require and to your Honors may seem meet, &c.

The Answer admits, generally, the facts stated in the bill relative to making and extending the letter of credit, and to the bankruptcy of the defendants, and the appointment of the defendant as assignee of the firm of James Read & Co. ; it also admits, that upon application by the plaintiffs, the defendants did deliver up to the plaintiffs six bills of lading of merchandise, but he submits, that they had no right or authority so to do ; and that the said delivery and endorsement were null and void.

The bill annexes a schedule of certain merchandise shipped by Fletcher, Alexander & Co. to James Read & Co., and a schedule of merchandise received and sold, and the proceeds of which were disposed of by James Read & Co. previous to their going into bankruptcy, and, asserts that no part thereof has come to the possession or control of this defendant, except certain sums of money, which were due and owing to the said James Read & Co. on the said seventeenth day of March, on account thereof, which have not yet been collected, and certain merchandise received by this defendant since that time, which are set forth in an exhibit, and which conform to the exhibit annexed to the plaintiffs' bill.

The bill further alleges, that the defendant to his knowledge, information and belief, received no formal notice of any claim of the plaintiffs to the said merchandise, or the proceeds thereof, until after the twenty-third day of April last, when he was appointed assignee as aforesaid, and that no formal demand has been made upon him for an account or delivery thereof, or otherwise, unless the filing of the said bill of complaint was such demand. But that the said Curtis and his solicitors did before and after this defendant's appointment as assignee, as aforesaid, and before the filing of the said bill,

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have one or more casual conversations with this defendant, in which they alluded to the possibility of their making such a claim and filing such a bill, but the same were not understood by this defendant as meant for or intended to be formal demands or in the nature thereof, nor as legal notices that such claim would be attempted to be enforced.

That no part of the merchandise purchased by means of bills of exchange drawn under the said letter of credit and the extension thereof, was purchased by the said plaintiffs or from them, but that the same was purchased by various persons, acting as agents, or under the directions of the said James Read & Co., and for their sole account, and that these persons, in order to reimburse themselves for the said purchases, drew bills on the said plaintiffs, in pursuance of the orders of the said James Read & Co.

That the merchandise, so purchased, was forwarded to the plaintiffs at Liverpool to be shipped to the said James Read & Co. at Boston, and the said plaintiffs voluntarily and of their own accord, parted with the possession of the said merchandise, and consigned the same to the said James Read & Co., and suffered the same to go into their absolute possession, and to be sold or disposed of at their pleasure, without any claim or notice of any title, interest or lien of the said plaintiffs in or upon said merchandise or any part thereof.

The defendant denies, that the said plaintiffs have, or are entitled to have, in Law or in Equity, any lien upon the said goods and the proceeds thereof, or any right, title or interest in or to the same, and claims, that such of said merchandise as was in the hands of the said James Read & Co. at the time of the filing of their said petition, and such as has since come to the possession of them, or of this defendant, and the proceeds of all such merchandise theretofore sold, are vested in this defendant, as the assignee of the estates of the said James Read & Co., free from and divested of all liens, claims

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or demands whatsoever, in favor of the plaintiffs, and that he claims so to hold them for the benefit of the creditors of the said estate; and to be disposed of according to law.

And this defendant further says, that, with regard to the goods on hand on the said seventeenth day of March, the said James Read & Co. had paid or given bonds for the payment of the duties thereon; with regard to those received since that time, this defendant has paid the duties thereon, and this defendant claims to be reimbursed for all the duties so paid or secured to be paid upon said goods, and for all expenses of freight, storage, truckage, and other incidental expenses, incurred in or about said goods, if it should be held that the plaintiffs are entitled to the same.

Whereupon this defendant respectfully prays, that he may be hence dismissed and allowed his costs.

The following statement was, by consent, made a part of the case :

The letter of credit and the agreement for a lien, which was co-extensive with it, expired in December, 1841; after which time, all the drafts mentioned in the bill were drawn and accepted.

The said Read & Co., and Thomas B. Curtis, were ignorant, that the letter of credit expired at that time, and acted on the belief, that it had not expired; and it is presumed, that the plaintiffs were also ignorant of the fact when they accepted the bills.

This fact was not known to the counsel in the case, when the bill and answer were filed, and they may be taken as amended accordingly.

C. P. & B. R. CURTIS, for plaintiffs.

The cause was set down for a hearing upon the bill and

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answer, and was argued by *B. R. Curtis* and *C. P. Curtis*, for the plaintiffs, and by *Francis C. Loring*, for the defendant.

STORY, J. — It does not appear to me, that there is any real difficulty in the present case. The bill asserts an equitable lien against certain shipments, and the proceeds thereof, in the hands of Mr. Morey, as assignee in bankruptcy of *Messrs. Read & Co.*, under an agreement stated in the bill, and admitted by the answer, as security for advances made by the plaintiffs under the same agreement. I say, under the agreement, because, although the acceptances and advances were, in fact, made after the time stipulated in the renewed agreement for a prolongation of the original credit (in which I suspect the words "from *its* date" are inserted by mistake instead of "from *this* date"); yet it is agreed by the parties in the additional statement introduced into the case, that, in point of fact, the parties on both sides acted upon the supposition, that the renewed agreement actually covered these very acceptances and advances, and that the terms of the original and renewed agreements were fully intended to apply to all the shipments made in precisely the same manner and to the same extent, as if they had been positively included therein. Under such circumstances, in a Court of Equity, the case stands precisely in the same predicament, as if the written agreements did cover them; for, in Equity, that is deemed to be done, which the parties intended to do, and which ought to be done.

Now, before proceeding to the points, more directly in judgment, it is proper to remark, that it is a perfectly well settled principle in Equity, that the assignee in bankruptcy takes the property and rights of the bankrupt in the same plight and condition, and with all the equities attached thereto, in the same manner as the bankrupt himself held them. I recollect at present but one exception to the doctrine, and that is in the

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case of fraud. The general rule was laid down by Lord Hardwicke in *Brown v. Heathcote* (1 Atk. Rep. 160, 162), and it has been constantly adhered to ever since. I need not cite the authorities at large. Many of them will be found referred to in a recent opinion, which I had occasion to deliver in the case of *Mitchell, assignee, v. Winslow*, at the last October Term of the Circuit Court at Portland.¹

This then being the established principle, the first question, which arises in the case, is, whether there is any equitable lien, or right, or claim, under the agreement, which ought to be enforced specifically in Equity against the shipments made to and for Messrs. Read & Co., or the proceeds thereof, so far as they can be distinctly traced in the hands of the assignee; and upon this point, I entertain no doubt whatsoever. In Equity there is no difficulty in enforcing a lien or any other equitable claim, constituting a charge *in rem*, not only upon real estate, but also upon personal estate, or upon money in the hands of a third person, whenever the lien or other claim is a matter of agreement, against the party himself, and his personal representatives, and against any persons claiming under him voluntarily, or with notice, and against assignees in bankruptcy, who are treated as volunteers; for every such agreement for a lien or charge *in rem* constitutes a trust, and is accordingly governed by the general doctrine applicable to trusts. The case of *Farr v. Middleton* (Prec. in Chan. 174, 175); *Collyer v. Fallon* (1 Turner and Russ. R. 469, 475, 476); and *Legard v. Hodges* (1 Ves. jr. R. 478), are fully in point. In the case of *Collyer v. Fallon* (1 Turn. and Russ. R. 469), Sir Thomas Plumer (the Master of the Rolls) said, "The argument on his side (the plaintiff's) has been, that whenever parties contract with respect to a subject matter,

¹ See also 2 Story Eq. Jurisp. s. 1224, s. 1411

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that subject matter is thereby bound. I assent to the principle when rightly understood ; but it is a principle, which must be received with qualifications. Contract with respect to a given matter binds the property as between the parties to the contract ; but it does not affect the rights of third persons, or bind the property in reference to any claim, which they may have upon it, unless they either have notice, or are volunteers. This limitation of the proposition is stated explicitly by Lord Loughborough in the very passage which was relied on (1 Ves. jr. 478). ‘ Whatsoever,’ says he, ‘ is the agreement concerning any subject real or personal, though in form and construction merely personal and suable only at law, yet, in this Court, it binds the conscience ;’ that is to say, the conscience of the parties to the agreement, and of those, who claim under them, either with notice or without consideration. For his lordship adds ; ‘ This maxim I take to be universal, that, wherever persons agree concerning a particular subject, that in any Court of Equity, as *against the party himself, and any claiming under him voluntarily or with notice*, raises a trust.’ ”¹ So that, as a matter of trust directly growing out of, and provided for by, contract, the present case falls directly within the principle above stated. The goods and the proceeds thereof are expressly, by the agreement of the parties, “pledged and hypothecated ” as collateral security for the advances. But then it is suggested, that in the proviso of the second section of the Bankrupt Act of 1841, ch. 4, there is no saving of any liens, except such as are valid by the laws of the States respectively ; and it is added that, by the laws of Massachusetts, where the bankruptcy took place, no equitable lien exists, or can be enforced, in cases of this sort. My opinion is, that the terms of the proviso in the second section embrace all liens, equitable as well as legal, which are valid by the State laws.

¹ See also 2 Story Eq. Jurisp. s. 1228, s. 1229, s. 1231, s. 1249, note.

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I am yet to learn, that an equitable lien may not exist in Massachusetts, and is not valid between the parties in this State. It is no answer to say, that no remedy is provided for the enforcement of such liens by the State jurisprudence in the State Courts. That does not show, that no such liens exist; for many cases of acknowledged trusts no remedy at present exists in the Courts of this State; but that does not show, that they have no existence or validity. Trusts in assignments, and in last wills and testaments, and equitable rights, growing out of partnerships, were, until a comparatively recent period, without any means of being enforced in the State Courts of this State. But has any one ever doubted, that, by the law of Massachusetts, such trusts were always valid? There is not, I believe, any remedy now in the State Courts to enforce the lien of a vendor for the purchase money of an estate sold by him, even when expressly stipulated for; but yet in *Gilman v. Brown* (1 Mason R. 191), *S. C.* (4 Wheat. R. 255), the Supreme Court entertained no doubt, that such a lien, when express or implied, was valid, and might be enforced in the Courts of the United States possessing Equity jurisdiction, although not remediable in the State Courts. In short, it has been long since settled in the Courts of the United States, that the Equity jurisdiction and Equity jurisprudence administered in the Courts of the United States are coincident and co-extensive with that exercised in England, and is not regulated by the municipal jurisprudence of the particular State, where the Court sits. This was expressly decided in *Robinson v. Campbell* (3 Wheat R. 212, 220), and *United States v. Howland* (4 Wheat. R. 108).

But the proviso in the second section of the Bankrupt Act of 1841 does not limit the rights of parties to the liens created and supported by the laws of the States. It merely recognizes and preserves their validity. It was by no means intended to affect any of the equitable liens or other equitable

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claims of parties, arising under their contracts, where the contracts themselves were, by the *lex loci contractus*, valid; as there can be no question, that this was, as between the parties themselves. The fullest jurisdiction is given by the Bankrupt Act both in the District Court and the Circuit Court, in Equity in all matters touching the bankruptcy; and, of course, that jurisdiction must be, and is to be, exercised according to the general principles applicable to Courts of Equity.

The objection, therefore, is untenable. Assuming, that the State Courts have no power to enforce the lien, or equitable claim or charge, arising under the present agreement, it is still capable of being specifically enforced in this Court under its general Equity jurisdiction, as well as under its particular jurisdiction conferred by the Bankrupt Act.¹ It is a valid agreement between the parties, and not prohibited by the laws of Massachusetts.

But it is said, that the agreement, if enforced, will operate as a fraud upon the creditors of Read & Co. under their bankruptcy; and indeed, that an agreement of this sort, so far as respects creditors, is void, as against the policy of the law, and in derogation of the rights of creditors. Now, it is not pretended, nor even suggested, that any fraud was, in fact, contemplated by the parties, or any of them, upon the creditors. The transaction was *bonâ fide*, for a valuable consideration, and for future advances, to promote the commercial business of the firm of Read & Co., and not to withdraw any of their existing funds from their creditors. No insolvency or bankruptcy, or failure in business, was then contemplated by either of the parties. It was as fair and honest a commercial transaction, in its origin, and progress, and consummation, as was probably ever entered into. How, then, it is against the policy of the law, I confess myself unable to perceive, unless

¹ Act of 1841, ch. 9, s. 8.

we are prepared to say, that taking collateral security for advances, upon existing or future property, on the part of a creditor, without taking possession of the property at the same time, or when it comes in esse, is *per se* fraudulent. Possession is ordinarily indispensable at the common law to support a lien; but even at the common law, it is not absolutely indispensable in all cases. This is shown by the recent case of *Dodsley v. Varley* (12 Adolph. and Ellis, 632), where goods had been sold and deposited in the warehouse of a third person for the vendee; but still it was understood between the parties, that the vendee was not to remove them, until payment therefor; and it was held by the Court, that, although the warehouse must be considered as the vendee's warehouse, and he in the actual possession of the goods, yet, "consistently with this, the vendor had, not what is commonly called a lien determinable upon possession, but a *special interest*, sometimes, but improperly, called a lien, growing out of the original ownership, independent of the actual possession, and consistent with the property being in the vendee." What is this, but allowing the existence of an equitable lien, notwithstanding the possession of the goods is parted with, good between the parties, and good as to all persons, not claiming under the vendee, as *bona fide* purchasers for a valuable consideration without notice? But I take it to be clear, that not only liens, but mortgages of personal property are perfectly good and supportable between the parties, and against creditors, where there is no fraudulent intent, and the possession remains in the owner or mortgager of the property, and is consistent with the deed and the arrangements made between the parties. That was one of the points decided in the case already alluded to, of *Mitchell, assignee, v. Winslow*. There is a long line of authorities, that in cases of sales of personal property, conditional or absolute, the transfer or conveyance is not void, even though

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the possession remains with the vendor, if that possession is consistent with, and a part of, the arrangements intended by the parties in the transfer or conveyance. So that the possession of the property by Messrs. Read & Co., in the present case, is not, in my judgment, a badge of fraud, or against the policy of the law, or in any manner to be deemed inconsistent with the just rights of their creditors; and, therefore, the agreement is binding and valid to give a lien or equitable charge upon the property in the hands of the assignee, fit to be enforced in the present suit.

In respect to the other point, suggested at the bar, whether the duties, paid by Messrs. Read & Co. upon the importation of the goods, are to be allowed for and deducted from the value thereof, or of the proceeds in the hands of the assignee, there does not seem to be any ground for the deduction; at least not, unless in respect to such goods, if any, as came into the assignee's hands charged with those duties, since the bankruptcy. The goods previously imported by Messrs. Read & Co., and the proceeds thereof, were to be chargeable with the advances; and it seems to me, that the intention of the parties was, that Messrs. Read & Co. should exclusively bear all the charges of their own importation under the agreement, the duties, as well as the freight and other charges.

These, I believe, are all the points, which it is necessary to notice in deciding the present case. A decree will be entered accordingly for the plaintiffs; and, if necessary, it will be referred to a Master to ascertain the amount due to the plaintiffs, and the amount of the property or its proceeds now in the hands of the assignee, which is affected by the equitable lien or charge, growing out of the agreement.

IN THE MATTER OF JOSEPH RICHARDSON AND ANOTHER.

THE doctrine, that, in law, there is no fraction of a day, is a mere legal fiction, and is true only in respect to cases where it will promote right and justice.

By the Constitution of the United States, every bill takes effect as a law, from the time when it is approved by the President, and then its effect is prospective and not retrospective.

A petition for the benefit of the Bankrupt Act was filed in the District Court on the third day of March, 1843, about noon; the Act of the third of March, 1843, repealing the Bankrupt Act, passed Congress, and was approved by the President, late in the evening of the same day. *Held*, that the Court had jurisdiction of the petition at the time when it was filed and acted upon, and that it had full jurisdiction to entertain all proceedings thereon, to the close thereof, according to the provisions of the Bankrupt Act.

THE following statement of facts, and the question arising thereon, was adjourned into this Court from the District Court of Massachusetts, to wit: The petition for a decree of bankruptcy, in this case, was filed about noon of the third day of March, A. D. 1843, and due notice thereof was ordered and published, and the same was duly proved in Court, on the second Tuesday of May following, being the time and place appointed for the hearing of said petition. The act of Congress, entitled "An act to repeal the Bankrupt Act," was approved by the President of the United States, late in the evening of the same third day of March, to wit, several hours after the filing of said petition; and was as follows: "Be it enacted, &c. That the act entitled an act to establish a uniform system of bankruptcy throughout the United States, approved on the nineteenth day of August, eighteen hundred and forty-one, be, and the same hereby is, repealed. Provided, that this act shall not affect any cause or proceeding in bankruptcy commenced before the passage of this act, or any pains, penalties or forfeitures, incurred under the said act; but every such

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proceeding may be continued to its final consummation, in like manner as if this act had not been passed. Approved March 3, 1843." Whereupon counsel, for the petitioner, raised the following preliminary question for the decision of the Court: "Has the District Court jurisdiction to receive said petition, and entertain all proceedings thereon to the close thereof, according to the provisions of the act, entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved on the 19th day of August, A. D. 1841?"

No person appeared to contest the application of the petitioners.

J. Giles, for the petitioners, argued as follows:—This act saves all cases in bankruptcy commenced before its passage. The passage of this act is matter of record, and it stands upon the public records, "Approved March 3, 1843." The filing of the petition in bankruptcy by the petitioners is also a matter of record, and it stands on the records of the Court, "filed March 3, 1843." See Bankrupt Act, section 13, Rules I. and III.

The petition, therefore, does not come within the proviso of the repealing act, unless a fraction of a day be allowed, and it can be legally shown, as the case finds, that, in point of fact, the petition was filed some hours before the repealing act was approved and signed by the President.

In England, prior to April 8th, 1793, every act of parliament, in which no particular time was specified for its commencement, was held to operate and take effect from the first day of that session of parliament wherein it was made, *Panter v. Attorney General*, 25th May, 1772 (6 Bro. P. C. 486).

In *Latless v. Holmes* (4 T. R. 660) it was held, that an act to take effect from and after its passage, operated by legal relation from the first day of the session, and the Court relied

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upon *Panter v. Attorney General*, just cited. In *Latless v. Holmes*, the Court observed, that *though the day when the act received the royal assent be stated in this case, we can only know by reference to the statute book, when the act passed.* This rule, that acts of parliament, when no time was fixed for their commencement, related to and took effect from the first day of the session, was declared as early as Henry VI., and adhered to down to April 8th, 1793, though the consequence of it was sometimes to render an act murder, which would not have been so without such relation. Dwaris on Statutes, Part 2d, p. 682, and cases there cited.

The statute of 33 Geo. III. ch. 13, reciting, that the above rule of law is liable to produce great and manifest injustice, enacted, that the clerk of the parliament should indorse on every act of parliament to be passed, after April 8, 1793, immediately after the title of the act, the *day, month, and year* when the same shall have passed and received the royal assent, and such indorsement shall be taken to be a part of the act, and to be the date of its commencement, when no other commencement shall be therein provided. Since this act, I do not find any instance, where it has been inquired into, what particular hour of the day an act passed and received the royal assent.

It is an ancient maxim, that, in law, a day is like a mathematical point, admitting of no fractions — such is the general rule ; but there are exceptions, where it is necessary, for the purposes of justice, to distinguish time with accuracy ; for fictions of law hold only in respect to the ends and purposes for which they were invented, *Morris v. Pugh* (3 Burrows, 1241).

In *Combe v. Pitt* (3 Burrows, 1434) Lord Mansfield observed : “ But though the law does not in general allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And *I do not see why the very hour may not be*

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so too, when it is necessary and can be done : for it is not like a mathematical point, which cannot be divided." In consideration of law, there is priority of time in an instant, as it may be divided into two parts. Co. Litt. 185, 6.

The Court will notice a fraction of a day in administering the bankrupt law. Where the question was between an assignee and attaching officer, which should hold certain property of the bankrupt, the Court ruled, that the exact time of the attachment and of the act of bankruptcy might be shown, which was first in point of fact, though appearing of record to be of the same day. *Thomas v. Desanges* (2 B. & A. 586); *Saddler v. Leigh* (4 Camp. 197); *Stead v. Gascoigne* (8 Taunt. 527; 8 Ves. 80).

In Massachusetts, the day, hour and minute of recording deeds, and of making attachments of real estate, are made matter of Record. Rev. Stat. ch. 90, sec. 20; ch. 59, sec. 24.

In private instruments to take effect from the day of the date; the day of the date may be taken inclusive or exclusive, according to the subject matter, and so as to effectuate the intention of the parties. *Pugh v. Duke of Leeds* (Cowp. R. 714).

As the bankrupt act was remedial, it may perhaps be fairly inferred, that it was the intention of Congress that the repealing act should not take effect until after the 3d of March, 1843, exclusive.

In point of fact, the bankrupt act of August 19, 1841, was in force when the petition in this case was filed, and that fact cannot be altered or done away with by any legal fiction or relation. If the repealing act defeats the petition in this case, it does so by a retrospective operation. Statutes are to be considered prospective, and not to prejudice or affect the past transactions of the subject, especially where it would tend to produce injustice or inconvenience. *Whitman v. Hapgood* (10 Mass. 347).

Perhaps it will be asked, can the repealing act be good for any part of the 3d of March, and not for the whole day? I answer it can, unless reasons of public policy or expediency forbid the inquiry as to the exact time when an act received the approbation and signature of the President. To subject the President to an inquiry as to the exact time when he signed a bill is certainly very objectionable; and other inconveniences will readily suggest themselves as being likely to occur, if the Executive could defer the operation of an act until the last minute of the day on which he should sign it. But all these considerations must give way to the demands of justice, or to the just requirements of the constitution.

The language of the constitution of the United States, is somewhat peculiar on this subject. Const. of U. S. art. I. sect. 7: "Every bill, which shall have passed the House of Representatives and the Senate, shall, *before it become a law*, be presented to the President of the United States, if he approve, he shall sign it, but if not, he shall return it, &c.; if approved by two thirds of both houses, by yeas and nays entered upon the journal, it shall become a law; if not returned within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, &c. Every order, resolution or vote, &c., shall be presented to the President of the United States, and before the same shall take effect, shall be approved by him, &c." Can an act, after it is approved and signed by the President, by legal relation take effect, become a law, and be in force prior to such approval and signature, without violating the express language and intention of the constitution? And the question is, can an act not approved nor signed by the President until ten o'clock at night on the third of March, render void this proceeding in bankruptcy, which was commenced about noon on the same third of March, when the bankrupt law was in full force and operation; especially as the repealing act expressly saves all proceedings in bankruptcy

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commenced before the passage of that act? An affirmative reply to this question cannot be given upon any other ground than that the law in such a cases as this admits of no fractions of a day.

In the matter of *Howse*, in Vermont (6 Law Reporter, 297), Prentiss, Justice, decided, that a petition filed on the third of March was too late, and that the Court could take no order upon it except to dismiss it. In New York, petitions filed on the third of March have been received and proceeded in to their final consummation.

There is a general principle, running through all our American constitutions, that no bill or act shall become and have the force of law, until certain formalities, which are in the nature of checks and restraints, have been complied with ; and the inference I would draw from that fact, is, that it is contravening the policy of our written constitutions to allow an act to have the force of law, by relation even for that portion of the day of its passage, which has transpired before all the constitutional requisites have been actually fulfilled. Constitution of Mass. ch. I. sec. 2 : No bill or resolve of the Senate or House of Representatives shall become a law, or have force as such *until* it shall have been laid before the governor for his revision : and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same, &c.

STORY, J. — The present question embraces some novelty as to the interpretation of statutes, and the time of giving them effect. It appears, from the statement of facts, that the petition in this case for the benefit of the bankrupt act of 1841, ch. 9, was filed on the third day of March, 1843, about noon ; and that the act of third of March, 1843, ch. 82, repealing the bankrupt act, passed Congress, and was approved by the President, late in the evening of the same day. The language of this last act is, "That the act entitled 'an act to establish

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a uniform system of bankruptcy throughout the United States,' approved on the 19th day of August, 1841, be, and the same is hereby repealed." There is a proviso, "That this act shall not affect any case or proceeding in bankruptcy commenced before the passage of this act." Now, upon this posture of the case, the question arises, whether the repealing act took effect by relation, from the commencement of the third day of March, 1843; or, whether it took effect only from the act of approval by the President, on the evening of the same day. If the former be the true, legal interpretation, then the District Court had no jurisdiction to entertain the petition; if the latter be the true intendment of law, then the District Court had a clear jurisdiction in the premises, and the jurisdiction having once attached, the proviso saves all further proceedings under the petition.

I am aware, that it is often laid down, that in law there is no fraction of a day. But this doctrine is true only *sub modo*, and in a limited sense, where it will promote the right and justice of the case. It is a mere legal fiction, and, therefore, like all other legal fictions, is never allowed to operate against the right and justice of the case. On the contrary, the very truth and facts, in point of time, may always be averred and proved in furtherance of the right and justice of the case; and there may be even a priority in an instant of time; or in other words, it may have a beginning and an end.¹ The common case put to illustrate the doctrine, that there is no fraction in a day, is the case, when a person arrives at majority. Thus, if a man should be born on the first day of February, at 11 o'clock at night, and should live to the 31st day of January, twenty-one years after, and should at one o'clock of the morning of that day make his will, and afterwards die by six

¹ See *Digges's case* (1 Co. R. 174); *Fitzwilliam's case*, 6 Co. R. 33, Co. Litt. 135, a; Viner Abridg. A. 3, pl. 7.

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o'clock in the evening of the same day, he will be held to be of age, and his will be adjudged good. Here the rule is applied in favor of the party, to put a termination to the incapacity of infancy. The case of *Fitzhugh v. Dennington* (2 Ld. Raym. R. 1094; S. C. 6 Mod. R. 260; 1 Salk. R. 44), fully supports this doctrine, and it stands recognized and confirmed in other cases.¹ But, many cases may easily be put, where the real fact is allowed to prevail, and to be conclusive. Thus, for example, if a woman makes a deed of her land in the morning, and is afterwards married, or dies on the same day, the deed is good. So, if my ancestor die at five o'clock, in the morning, and I enter into his lands at six o'clock, and make a lease at seven o'clock of the same day, the lease is good. So, if the ancestor, and his immediate heir both die on the same day, and the inheritance would pass to different persons, according to the survivorship of the ancestor, or the heir, then, the actual fact, which survived the other, may be proved, so as to pass the inheritance to the proper party entitled thereto. Nay, the question of survivorship, may often, in the absence of direct proof, be decided by mere presumption, from age, sex, constitution, and other circumstances, where both perish by the same common calamity, as by the foundering of the ship, at sea, in which they are both embarked. In short, the true doctrine, upon this whole subject, is laid down in *Roe v. Wrangham v. Hersey* (3 Wils. R. 274), where the Court said; "It is said, that there is no fraction in a day; but this is a mere fiction in law; *fictio juris neminem ledere debet*; but avail much it may. And this is seen in all matters, where the law operates by relation, and by division of an instant, which are fictions in law." And,

¹ See Com. Dig., Infant, A. *Roe v. Wrangham* (3 Wils. R. 274); *Herbert v. Turbell* (1 Keble R. 589); Siderf. R. 163, pl. 18 (*Anon.* 1 Ld. Raym. 480).

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after putting various other illustrations, the Court added ; " By fiction of law, the whole time of the assizes, and the whole session of parliament, may be, and sometimes are considered as one day ; yet the matter of fact shall overturn the fiction in order to do justice between the parties." ¹ In *Combe v. Pitt* (3 Burr. R. 1423, 1434), Lord Mansfield approved a similar doctrine, and said ; " But, though the law does not, in general, allow of the fraction of a day, yet it admits it in cases, where it is necessary to distinguish. And I do not see, why the very hour may not be so too, where it is necessary, and can be done ; for, it is not like a mathematical point, which cannot be divided." So that we see, that there is no ground of authority, and, certainly, there is no reason to assert, that any such general rule prevails, as that the law does not allow of fractions of a day. On the contrary, common sense and common justice equally sustain the propriety of allowing fractions of a day, whenever it will promote the purposes of substantial justice. Indeed, I know of no case, where the doctrine of relation, which is a mere fiction of law, is allowed to prevail, unless it be in furtherance and protection of rights, *pro bono publico*.

But it appears to me, that the doctrine assumes a broader importance under the constitution and laws of the United States.

By the constitution of the United States, " Every bill, which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States ; if he approve it, he shall sign it ; but, if not, he shall return it, with his objections, to the house in which it shall have originated," &c. &c. Now, it seems to me clear, from this language, that in every case of a bill, which is approved by the President, it takes effect as a law only by such

¹ See Com. Dig. Tamps. c. 8.

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approval, and from the time of such approval. It is the act of approval, which makes it a law ; and, until that act is done, it is not a law. The approval cannot look backwards, and, by relation, make that a law, at any antecedent period of the same day, which was not so before the approval ; for the general rule is, *Lex prospicit, non respicit*.¹ The law prescribes a rule for the future, not for the past ; or, as it is sometimes expressed, *Lex dat formam futuris, non preteritis negotiis*. And this, in a republican government, is a doctrine of vital importance to the security and protection of the citizen. It is fully recognised in the constitution itself, which declares, that no *ex post facto* law shall be passed. Put the case, that a statute, passed on the 3d of March last, which created and punished as public offences certain acts, which were not so before the passage of the statute ; and the statute was approved at eleven o'clock at night ; and an act was done in the preceding part of the day, which was innocent at the time when it was done ; could it be contended, that the party would be punishable therefor by relation ? Or that it was not within the prohibition of the constitution, as an *ex post facto* law, so far as it operated upon his case ? If it should be said, that the law does not recognise any fractions of a day, why may we not deem the law in force only from the last instant of the day, instead of carrying it back, by relation, to the first instant of the day ? If there be any choice, as to the principle of interpretation, one should think, that that ought to be adopted, in cases of this sort, which is most favorable to private rights and public justice. Surely the constitution is not to be set aside, or varied in its intendment, by mere legal fictions. On the contrary, it appears to me, that in all cases of public laws, the very time of the approval constitutes, and should constitute, the guide, as to the time, when the law is

¹ Branch's Maxims, p. 99 ; Jenkins's Text, 264.

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to have its effect, and then to have its effect prospectively, and not retrospectively. It may not, indeed, be easy, in all cases, to ascertain the very *punctum temporis*; but that ought not to deprive the citizens of any rights created by antecedent laws, and vesting rights in them. In cases of doubt, the time should be construed favorably for the citizens. The legislature have it in their power to prescribe the very moment, *in futuro*, after the approval, when a law shall have effect; and if it does not choose to do so, I can perceive no ground, why a Court of justice should be called upon to supply the defect. But, when the time can be accurately and fully ascertained, (as in the present case), when a bill was approved, I confess, that I am not bold enough to say, that it became, by relation, a law at any antecedent period of the same day. I cannot but view such an interpretation as at war with the true character and objects of the constitution.

Upon the whole, my opinion is, that the question adjourned into this Court by the District Court, ought, upon the statement of facts, to be answered in the affirmative; and that the District Court had jurisdiction of the present petition at the time when it was filed and acted upon; and that it has full jurisdiction to entertain all proceedings thereon, to the close thereof, according to the provisions of the bankrupt act of 1841, ch. 9.

AUGUSTUS H. FISKE, ASSIGNEE, v. LYMAN HUNT.

A SUEB B. and trustees in October, 1843, in assumpsit, and as no defence existed, B. was, with his consent, defaulted. The cause was then continued for two successive terms, in order to ascertain, whether the trustees had any effects, when, no application having been made to take off the default, or to stay the proceedings, a final judgment was rendered against B. on May 26th, 1843, and execution issued on June 22d, 1843, and was levied on the real estate attached. On January 25th, 1843, B. petitioned for the benefit of the Bankrupt Act. and was declared a bankrupt on March 14th, 1843. C. was appointed his assignee on April 7th, 1843, and obtained from the District Judge a writ of injunction to restrain B. from proceeding in his suit, which was dissolved on the application of B. on April 28th, 1843. This bill was then brought, praying the Court to set aside the judgment, and to order the moneys levied upon to be paid over to the assignee, and for other relief. *It was held*, that, as the default was entered before the bankruptcy of B., and was entered without surprise, mistake, or fraud, but with the consent of B., and as no application had ever been made to take it off, that there was no good ground to set aside the judgment.

It was also held, that, as the suit brought in the District Court was not identical with the bill in the present case, the decision therein could not be pleaded as a flat bar; but since the relief asked of this Court was a matter in its sound discretion, and not of right, that the decision operated strongly to influence it in refusing to interfere in the matter.

The doctrine in *Ex parte Foster* (*ante*, p. 132) affirmed.

BILL in Equity. The material facts, set forth in the bill and admitted in the answer, sufficiently appear in the opinion of the Court. A general replication to the answer was put in; but no evidence was taken by either side, and the cause was, therefore, argued upon the bill and answer.

Rand, for the assignee; *B. R. Curtis*, for the defendant.

STORY, J.—The statement of the material facts in the present case may be thus briefly given. The creditor, Hunt, sued the bankrupt, Healey, in assumpsit, on a writ of attach-

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ment, on which real estate was attached, and the trustees were summoned, in the State Court of Common Pleas for Suffolk county, returnable to the October Term, 1842; and no defence then existing, the defendant Healey was, with his own consent, defaulted. The cause was then continued to the next January Term of the same Court, 1843, in order to ascertain, whether the trustees, or some of them, had any effects; and it was again continued, for the same purpose, to the April Term of the same Court. At the April Term, no application having been made to the Court of Common Pleas to take off the default, a final judgment was rendered against the defendant Healey, on the 26th day of May, 1843. In the intermediate time, to wit, on the 25th day of January, 1843, Healey petitioned the District Court for the benefit of the bankrupt act, and on the 14th day of March, 1843, he was accordingly declared a bankrupt; and upon the 20th day of the same month, Fiske (the plaintiff) was appointed the assignee of his estate. On the 7th of April, before the judgment was taken, the assignee made an application to the District Judge for a writ of injunction against the defendant, Hunt, that he might be restrained from further prosecuting his said suit, which was granted upon a hearing *ex parte* on the same day. Hunt afterwards made an application to the Court to dissolve the injunction, so granted; and upon the hearing of the case, on the 28th of April, 1843, the injunction was dissolved by the District Court; and on the 26th of May, 1843, the judgment was entered in the suit in the Court of Common Pleas. No application was made to the Court of Common Pleas, at any time before the judgment, to take off the default, or to stay the proceedings or judgment. An execution was issued on the judgment on the 22d of June, 1843, and by levies thereon the execution was satisfied for about \$4463.98. The bill seeks to set aside the judgment as a fraud upon the bankrupt, and to have the moneys and prop-

erty levied and received upon the execution paid over and re-conveyed to the assignee, and for other relief.

The case, then, for the purposes of the argument, stands for consideration upon the following points, (1). Whether the assignee is entitled to any relief, in a case where, before the bankruptcy, the judgment debtor has voluntarily consented to be defaulted; and, of course, where, in a legal sense, he is out of Court, and has no day either for appearance or pleading in the Court. (2). Whether it will make any difference in the case, that the judgment has been rendered after the bankruptcy, with a full knowledge thereof. (3). Whether it will make any difference, that the assignee has full knowledge of the proceedings in the Court, where the suit is pending, before the judgment is rendered, and makes no application to take off the default, or to suspend the judgment. (4). Whether the final hearing upon the matter of the injunction before the District Court is conclusive upon the point, that the creditor, Hunt, was lawfully entitled to take judgment, and that the assignee, having elected his remedy before the District Court, can entitle himself in the Circuit Court to maintain the present bill.

In respect to the three first points (which may be conveniently considered together), it is material to be borne in mind, that, in cases unaffected with fraud, the assignee generally, although perhaps not universally, succeeds to those rights and those rights only, which belong to the bankrupt. His remedy may be more extensive, growing out of the bankruptcy; but his rights are not enlarged. In the present case, there is no pretence to say, that the default, or the judgment was a fraudulent contrivance, between the bankrupt and the creditor (Hunt), to give the latter a preference, in contemplation of bankruptcy. Such a contemplation, if it had existed, would have been sufficient to have vitiated all the proceedings. Now, is there any ground to suggest, that the creditor (Hunt)

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proceeded to take his judgment suddenly after the bankruptcy, before the assignee was appointed, or had an opportunity to apply to the Court of Common Pleas to take off the default, or to stay proceedings. That might have presented a very different case. Here the case is one, where no application was ever made to take off the default, or stay proceeding so as to let the party into any defence arising under the bankruptcy, in case the bankrupt should obtain his discharge. The bankrupt and the assignee must, therefore, be deemed to have submitted voluntarily to the judgment, either upon the ground, that they would not be successful in any such application, or that it would not furnish, if allowed, any just ground of defence, under all the circumstances. Now, I must say, that, looking to these special considerations, and to the fact, that the default was by the express consent of the debtor (Healey), it does not strike me, that there is laid in the bill any just ground of relief upon the default and judgment. The assignee and the bankrupt have both voluntarily withdrawn from the Court, where the suit was pending, and suffered the judgment to go without opposition. In these respects, it must resemble the case *Ex parte Vose*, decided in this Court a few days ago, although distinguishable from that in some other particulars.

But I should be unwilling to rest the present case upon this narrow ground, because it seems to me, that the Court is called upon, by the frequency of the occurrences of this sort, to lay down a rule more comprehensive upon the subject. And it strikes me, that, after the term has passed, at which the default has been entered before the bankruptcy, not by surprise, or mistake, or fraud, but by the voluntary consent, or wilful non-appearance of the party, then, and under such circumstances, as the matter of taking off the default is and must be a matter of sound discretion in the Court, where the suit is pending, and not of absolute right in the party, this Court ought

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to be very slow in interfering with that discretion ; and unless under extraordinary circumstances, raising some Equity, it ought to leave the case to the Court where it is pending, to act *ex aequo et bono*, as it deems suited to the merits of the application. But at all events, I am prepared to say, that where a default has been so entered, and an assignee has been appointed before judgment, and has not, with knowledge of the fact, chosen to apply to the Court to take off the default, or to stay the proceedings, that, of itself, ought to be deemed an abandonment of any defence in such suit, and conclusive upon all the creditors whom he represents. Further than this it is not necessary to go, in order to decide the present case ; and, therefore, I leave the naked question, whether after a default, which has never been taken off, or has been refused to be taken off by the Court, and the judgment has been rendered thereon (without any prohibitory injunction), any redress ought to be given, either in this Court or in the District Court in bankruptcy, to be decided, when it shall directly arise in judgment.

Upon the other remaining point, as to the effect of the dissolution of injunction by the District Court, there may perhaps be more difficulty. The suit in the District Court, and the bill in this Court, are not, indeed, throughout identical in their matter, or their claim for relief. The petition for an injunction, under the circumstances, could go no farther than to ask for an interlocutory decree for an injunction, until it should be ascertained, whether there should be any discharge granted to the bankrupt, which could be pleaded in bar of the suit. It was, of course, temporary ; and the granting it was not decisive of the merits of the application. But when the Court dissolved the injunction, which I am to take, from the statement in the case, to have been a decree upon the merits of the application, and not upon any ground of irregularity, there, by implication, the Court must have decided, that there was no ground to prevent the creditor from proceeding to judg-

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ment in his suit upon the default. Now the present bill asks for relief against that very judgment, and to have it set aside, and to have the moneys and lands levied upon under the execution, to be restored to the assignee. This is certainly far broader relief than was claimed, or could, under the circumstances of the case, have been asked or given upon the petition for the injunction. But then the question still arises, whether in a case, like the present, the relief sought is a matter of right, or in the sound discretion of the Court. And if it be the latter only, then whether this Court ought to set aside the judgment, and grant the other relief prayed by the bill, after the District Court has impliedly sanctioned that judgment by allowing it to be entered. In my judgment, the interposition of the Court in a case of this sort is a matter of sound discretion, and not a matter of right in the party. Before the Court grants the relief, it should be entirely satisfied, that the judgment ought to be set aside, as improperly, or, at least, improvidently obtained; and that the creditor (Hunt) is entitled to no lien or equity in the premises, which should be protected and sustained by the Court against the claims of the other creditors. Now, I must say, that I am not able to perceive any solid ground, upon which this incipient claim, or right of priority or lien (call it which you please), created by the attachment, has been displaced, or ought to be displaced. The creditor has but followed out his legal rights to their natural and ordinary consummation. He has obeyed the injunction of the District Court, and taken judgment only, when, by the decree of that Court, he was definitively informed, that he was at liberty to do so, and that there was not in the judgment of the Court, sitting in bankruptcy, any ground to dispute, or to displace, or postpone his legal rights. Now, this was a matter clearly within the jurisdiction of the District Court, sitting as a Court of Equity in bankruptcy, under the 6th section of the bankrupt act of 1841, ch. 9. If that decision,

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coming incidentally under consideration, under the view of this Court, in a bill in equity for more general purposes is not, and cannot be pleaded as a flat bar to a bill, as I incline to think, that it cannot, still it addresses itself strongly to the discretion of the Court, as a matter fit to operate upon its own judgment, in refusing to interfere, where the judgment is founded upon a just claim, and the District Court has justified the creditor in entering it.

The cases, which have been cited at the bar in support of the bill, are, in my judgment, distinguishable from the present in leading circumstances. I adhere to the doctrine, laid down in *Ex parte Foster* (*ante*, page 131); and, indeed, after much reflection upon it since it was delivered, I maintain, notwithstanding some doubts, which have been attempted to be thrown over it by those, who have certainly misunderstood its true bearing, or have dissented from it, without condescending to answer its reasoning, that it is founded in the true interpretation of the bankrupt act of 1841, ch. 9, and upon authorities of the highest consideration and value. But in that case there was not only no default, but the cause was but just commenced, and no pleadings were had, and, indeed, the writ itself was not returnable until April after the petition was filed. *Parker v. Muggridge* (*ante*, p. 334) was a case of default, and a continuance for judgment under a special agreement, and it was held, that the creditors had a right, under the agreement, to proceed to judgment, and had an equitable lien on the property attached. In *Ex parte Cook* (*ante*, page 376), the judgment itself was obtained before the petition in bankruptcy was filed; and it was held to be a clear case of lien within the protection of the bankrupt act of 1841, ch. 9. *Ex parte Vose* has been already referred to, and, as has been said, approaches very near to the present. So far as it does go, it is against the plaintiff.

The cases, which have been cited from the English Courts,

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to establish the doctrine, that the Courts of common law will, after an interlocutory judgment upon default, set it aside in order to allow the bankrupt to plead his discharge, are, it seems to me, founded in good sense and reason.¹ But they are addressed to the discretion of the Court of common law, where the suit is pending, and might have furnished a good ground to that Court to take off the default, or to stay the proceedings. But no application was made to the Court of Common Pleas in the present case to take off the default, and final judgment was regularly rendered in the case. There is then no equity, addressed to this Court, from the circumstances, upon which it can act upon the judgment. It may be observed too, that the cases cited were to set aside interlocutory judgments; and that, by the late bankrupt act (6 Geo. 4, ch. 16, § 108), a special provision has been made to meet cases, where final judgments are rendered, and to take from the judgment creditor any more than his rateable proportion of the bankrupt's assets. But the judgment itself is not interfered with.²

The main stress of the argument of the plaintiff is this, that the lien was a conditional one, and not absolute, dependent upon future contingencies at the time when the bankruptcy took place. To that I agree; but then the judgment has been obtained upon that conditional lien, and perfected and made absolute thereby in a regular manner, without any fraud or impropriety on the part of the creditor, and without any surprise or asserted mistake on the part of the bankrupt, or of his assignee. The latter have had full opportunity to apply for relief, and to suspend the proceedings in the Court of Common Pleas before judgment, if they, or either of them had

¹ *Evans v. Gill* (1 Bos. and Pull. 52); *Duff v. Campbell* (3 Barn. & Ald. 576); see also *Sawtell, Petitioner, &c.* (6 Pick. 110); *Shearer v. Jewett* (14 Pick. R. 232); *Lovell v. Eastaff* (3 Term R. 554).

² *Tidd, Pract. vol. ii. p. 570, 9th edit. 1828.*

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applied to the Court for the purpose. Instead of adopting that course, they have silently acquiesced in the judgment, without interposition or objection. The assignee did apply to the District Court for an injunction to stay the proceedings and judgment; but the application failed of final success. The Circuit Court, therefore, is called upon to say, that a judgment, regularly obtained in the proper Court, by which the lien became absolute and was perfected, ought now to be set aside, and the execution thereof avoided, not because the judgment is not a just one, but because, if the assignee had interfered in the proper Court, the judgment might have been stayed; and, therefore, the Circuit Court ought now to do for the assignee what he might have done for himself in another Court, if he had thought proper to act in the premises. It appears to me, that the present case falls directly within the reasoning of the case *Ex parte Vose*. The assignee has not interfered at the proper time, or in the proper Court, to stay the judgment or to take off the default, and, therefore, he may, in a just sense, be said voluntarily to have withdrawn himself from the suit.

Upon the whole, in every view, in which I can contemplate this case, it is not one in which the assignee is entitled to relief in this Court.

Bill dismissed without costs.

CIRCUIT COURT OF THE UNITED STATES.

Fall Circuit.

MAINE, OCTOBER TERM, 1843, AT PORTLAND.

BEFORE { Hon. JOSEPH STORY, Associate Justice of the Supreme Court.
 { Hon. ASHUR WARE, District Judge.

WILLIAM V. KENT v. AMOS M. ROBERTS.

IN a suit brought by A. an attachment was made of lands lying in Penobscot county; but before execution issued, the portion of this county, containing the said lands, was set off, as Aroostook county. The execution was directed to the sheriff of Penobscot county and was levied by his deputy, who was also a deputy of the sheriff of Aroostook county. In a suit, brought by B. an attachment on the same lands was made subsequent to the attachment by A., but execution was levied under the second suit and attachment before the county was set off. The present is a writ of entry brought by the demandant, who claims through A. against the tenant, who claims through B. *It was held*, that the levy of B. was not to be postponed to that of A.; that the deputy of the sheriff of Penobscot county had no authority to levy the execution of A. on lands without his county; and that, although the levy was made by a deputy of Aroostook county, yet, since it was not directed to the proper officer, and not made by the deputy in behalf of such officer, it was utterly void.

An application was made to the Supreme Court of Maine to allow the execution to be amended by inserting a direction to the sheriff of Aroostook county, on the ground, that the clerk had accidentally omitted it, which application the Court refused to grant; and *It was held*, that this Court had no authority to review or overrule the decision by the State Court, it being in respect of a matter solely of local law.

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At the common law, if a sheriff seize goods on execution, and go out of office before the sale thereof is completed, he may proceed to sell them.

It seems, that where an attachment is made by a sheriff, who resigns his office before execution issues, he is not the proper officer to levy it.

Upon general principles, a sheriff can only levy upon such real estate as is within his county.

The rule, applicable to a purchaser claiming land, with notice of a prior unrecorded attachment, does not govern the case of two creditors, proceeding by suit, *in invitum*, with a knowledge of the attachments of each other. In the latter case, each is entitled to any priority, which he can, through his diligence, lawfully obtain over the other.

WRIT of entry for lands situated in Aroostook county, in the State of Maine. The case came before the Court upon an agreed statement of facts by the parties, which was as follows :

“ Both parties claim under one Robert M. N. Smyth.

“ The demandant claims the premises by virtue of an extent, made in September, 1838, of an execution in favor of one James N. Cooper, and against said Smyth, and of said Cooper's deed to him, the demandant, dated Feb. 17th, 1842.

“ The tenant claims by virtue of an extent, made in December, 1839, of an execution in favor of one John H. Pilsbury, and against said Smyth, and of said Pilsbury's deed to him, the tenant, dated December 3d, 1841.

“ Pilsbury, claiming the demanded premises as his own, had given a written permit, or license, to cut timber thereon, under which license persons were cutting, with the knowledge, but against the consent of the said Cooper, prior to and at the time of the executing of each of said deeds of Cooper and of Pilsbury. Both Pilsbury and Cooper had acquired liens on the demanded premises by attachments on their original writs, which they severally sought to perfect by their said extents. Pilsbury's attachment was the earlier, and Cooper was aware of that fact when he directed his levy to be made, and appeared and defended in Pilsbury's suit, in the character of a subsequent attaching creditor. Cooper, also, had been in-

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formed, that Pilsbury had executed his deed to the tenant, before he himself executed his to the demandant. When the attachments on mesne process and Cooper's levy were made, the premises were situated in the county of Penobscot; but before Pilsbury's execution was issued, viz. on the first day of May, 1839, the new county of Aroostook had been formed, so as to embrace the premises within its boundaries. Pilsbury's execution contained printed directions to the sheriff of each county in the State, by name, except Aroostook. For several years prior to the issuing of this execution, the executions issuing out of the clerk's office for the county of Penobscot were, in their printed parts, directed to the several sheriffs of each county in the State, by name. That county was not named. Of the other executions issued at the same term, part were like this, and part contained the name of "Aroostook" in the printed directions. Aaron Haynes, to whom Pilsbury's execution was delivered to be executed by him, as an officer of Aroostook county, and by whom the return thereon was made as such, was at the time of the levy, a deputy of each of the sheriffs of Penobscot and Aroostook. At the June Term, 1842, of the Supreme Judicial Court, sitting in and for Penobscot county, a motion was filed by Pilsbury for leave to amend his execution, by inserting the name of Aroostook in the direction to the sheriffs, and the full bench, after hearing arguments in the matter, refused to grant the leave prayed for.

"Office copies of said deeds, and of said executions, and of the levies made under them, so far as they concerned the demanded premises, and of the records of the Supreme Judicial Court, so far as they relate to said motion and the decision thereon, are annexed and made parts of the case. All amendments or applications therefor are to be considered by the Court, as if the case were on trial before a jury.

"The whole case is submitted to the Court, who are to

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direct judgment for demandant or tenant, as the facts and law shall warrant."

The case was argued at this Term by *Rowe*, for the demandant, and by *Fessenden* and *Deblois*, for the tenant.

The argument of *Rowe* was as follows: It is admitted, that the plaintiff is entitled to judgment, unless the defendant has title; and the only question proposed to the Court is, whether the levy on Pilsbury's execution, under which the defendant claims, passed the title, having been made by a deputy of the sheriff of "Aroostook," to whom the writ was directed.

Before considering that question, the attention of the Court is asked to a few facts, which show, that the defendant's claim to superior Equity is entirely unfounded.

The case is not between the execution creditors, but their grantees without knowledge.

Were the creditors themselves the parties, it would be the same. It would be a struggle between two creditors for the property of their common debtor, each entitled to what a strict interpretation of the law would give him, neither to favor.

Pilsbury, living at Bangor, the residence of Smyth, obtained knowledge of the debtor's insolvency, and caused an attachment of his real estate to be made, a little earlier than Cooper could, who resides at Pittston, seventy-five miles from Bangor. The advantage, derived from this circumstance, was lost by his negligence, or that of his attorney, in not having his execution properly directed, and not by any art or act of Cooper.

Cooper's execution issued earlier than he intended, through the omission of his attorney, in Kennebec, to have the case continued, and he found himself compelled either to abandon his lien, or to levy, and trust to chance to defeat the prior attachment.

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It was a fair race for the property of a common debtor, which the law of attachment holds out as the reward of the winner.

Pilsbury's levy was a nullity, from want of power in the officer, who made it. The power to make such levy is derived from the Statute of 1821, ch. 60, § 27 (the Statute then in force). That gives it only to "the officer to whom the execution is *directed* and delivered." The deputy of the sheriff of Aroostook did not come within the description.

The act of March, 1839, (stat. ch. 395), constituting the county of Aroostook, contains no provision, that can aid the defendant. On the contrary, a question might be raised, whether the attachment was not lost, by the removal of the subject matter of it beyond the precinct and control of the sheriff of Penobscot. Whether this be so, or not, there is no power given to the sheriff of Penobscot to perfect by levy the lien created by such attachment. And had there been, this levy would still be fatally defective. For the return shows, that the officer acted as deputy of the sheriff of Aroostook. And had he acted as sheriff of Penobscot, and could the land, by virtue of any statute provision, be considered as lying within his precinct, the extent would be void, through failure to notify the debtor, who resided in that county, to choose an appraiser.

The argument of *Fessenden* and *Deblois* was as follows: For the tenant it is contended, that the levy of Pilsbury conveys the land in dispute, and that by Pilsbury's deed to defendant, he has the title as against every one, and particularly as against the plaintiff. Pilsbury perfected his lien, created by the prior attachment, by making a legal levy on the same, and took the estate by a statute purchase, notwithstanding the levy of Cooper.

In the first place, we think, that the Court will not over-

look the fact stated in the case, that Cooper knew of the priority of Pilsbury's attachment. In this particular, there is a strong analogy to the recording of deeds, in relation to which Courts hold notice of prior conveyances equivalent to a recording of such conveyances. The case provides, that "all amendments or applications therefor, are to be considered by the Court, as if the case were on trial before a jury." This gives the Court license to allow the Defendant the advantage of such amendment, if it proves to be such an amendment as the Court, from which the execution issued, had a right or ought to have granted. We, therefore, consider this Court not only at liberty, but called upon to determine, whether the amendment should have been granted, as we now contend it should.

The Supreme Judicial Court have had a similar question before them, and settled the law, as we contend, it should have been determined, *Sawyer v. Baker* (3 Greenl. 29). If the clerk omit to affix the seal of the Court to an execution, it may be amended, even *after the execution has been extended on lands*, and the extent recorded.

Quite a large list of cases have been cited in this case, to which we beg leave to refer the Court. Particularly, *Campbell v. Stiles* (9 Mass. R. 217), where a writ of review was served by a sheriff to whom it was *not directed*, by inserting a direction to such sheriff. It was deemed a *misprision of the clerk*, and the writ was a *judicial one*. This we deem directly in point.

The same principle is recognised in *Burrell v. Burrell* (10 Mass. 222). This last case covers the whole ground. In *Young v. Hosmer* (11 Mass. 89), the Court held, that the insertion of a wrong christian name in an execution was a *misprision of the clerk*, and as such should be amended. But without examining particularly all the citations in the case of

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Sawyer v. Baker, we beg leave to refer to all those cases as establishing the point, for which we contend in this case.

The Supreme Judicial Court of this State assumed the same power over a record in *Crofton, Ex. v. Ilsey* (6 Green. 48). See, also, *Wright v. Wright* (6 Green. 415); *Seaman v. Drake* (1 Caines 9); *Close v. Gillispy* (3 John. R. 526); *Atkins v. Sawyer* (1 Pick. 351); *Ringold v. Brown* (4 Har. & McHen. 498). Where a judgment is entered, and execution issued without inserting costs in either, the Court allowed the defect to be amended, *O'Driscow v. McBurney* (2 N. & M. 58); *Mechanics' Bank v. Minthorne* (19 John. 244); *Peddle v. Hollinshead* (9 S. & R. 277); *Sharff v. Commonwealth* (2 Binn. 514).

The result of the examination of the authorities, above cited, the defendant contends, is, that the omission of the direction to the sheriff of Aroostook is a misprision of the clerk, and, as such, ought to have been amended, and of consequence, that the Court here will secure to the plaintiff the benefit, as if it had been granted by the Supreme Judicial Court. But we place our right to a decision in favor of our title on another point.

We contend, that, under the circumstances of this case, the levy by our deputy was good, although the precept was not formally directed to him, he having the authority by virtue of his office to make a levy on the premises in dispute. In *Hearsey v. Bradbury* (9 Mass. 95), it was settled, that if a writ be served by an officer, which he would be authorised to serve, if it were directed to him, but which contains no such direction, the plaintiff may have leave to amend by inserting such direction.

It would seem from this case, that the act of an officer, authorised to perform it, was in the view of the law effectually done, although the precept, under which he acted, was not directed to him. And why does it not follow in the case at

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the bar, that the officer, being authorised by law to do the acts he undertook to do, the acts themselves may be considered as done, although the precept, by which they were done, was not directed to him, and this too in a case in which the plaintiff had the fullest notice of the extent of the claim of the defendant.

STORY, J. — The sole question, which arises in this case, at least the sole question in controversy, is, whether the levy made upon Pilsbury's execution was good and valid. The execution was served by a deputy sheriff, who was a deputy of the sheriff of Penobscot county, and also of Aroostook county. The execution was directed to the sheriff of Penobscot county; but not to the sheriff of Aroostook county. The levy was actually made by the deputy, as a deputy of the sheriff of Aroostook county. There had been an attachment upon the land upon the original mesne process in the suit of Pilsbury, which was made by the proper officer of Penobscot county, the land then lying therein; but in 1839, the county of Aroostook was set off from Penobscot county, and included the land in controversy. After the levy of Pilsbury, an application was made to the Supreme Court of the State of Maine, at the June Term thereof in Penobscot county, to allow the execution to be amended, by inserting Aroostook county in the direction of the execution, upon the ground, that it was accidentally omitted by the clerk of the Court. The Court refused to grant the application.

It is under these circumstances, that the case comes before this Court for consideration, with an additional agreement by the parties, that "All amendments or applications therefor are to be considered by the Court, as if the case were on trial before a jury." The object of this clause seems to have been to bring under review and re-examination the decision of the State Court in denying the application for an amendment.

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But it strikes me, that this Court has no jurisdiction to entertain such a question, as it would be, in effect, exercising an appellate jurisdiction over the decision of the State Court, upon a process issuing from and under the authority of the State, and over which the State Court possesses, by law, a clear and exclusive jurisdiction. The authority of the Supreme Court of the State to grant or refuse amendments of process is a matter purely of local law, and of which that Court is the sole judge. It is not for us to say, what that authority is, and when and how it ought to be exercised, whether it is a matter of sound discretion in the Court, or of positive right in the party applying therefor. In either view, we can have no jurisdiction to reëxamine, or collaterally to question the jurisdiction or decision of the Court. If we were now to assume such an appellate authority, the Supreme Court of the State would have full authority to disregard our judgment, inasmuch as it could be, in no just sense, binding upon it, and would be assuming the final right to decide upon the true construction of a State statute and a State authority, exclusively dependent upon State legislation. It might have been, nay, it would have been, a very different question, if the execution had issued from this Circuit Court, and an application for an amendment, on account of misprision of the clerk in misdirecting it, had occurred. In such a case, we should have been at liberty to consider the case upon principle, and with reference to the authority, given to this Court by the laws of the United States, to grant amendments.

It may be proper, however, to suggest, that most of the cases, if not all, cited at the bar, as to amending misprisions of the clerk in the issuing of process, are distinguishable from the present. In some of them, there was a clear mistake of the clerk in not issuing a judicial process, in conformity to the prior process and proceedings in the same cause, which was his positive duty. Such was the case of the writ of review in

Burrell v. Burrell (10 Mass. R. 221); and the omission to affix the seal of the Court to an execution in *Sawyer v. Baker* (3 Greenl. R. 29); and the omission to enter judgment against the estate of the intestate in the case of *Atkins v. Sawyer* (1 Pick. 351). The same suggestion applies to the case of *Campbell v. Styles* (9 Mass. R. 217), which was the case of a writ of review, directed to the sheriff of Franklin county (Mass.), and served by the sheriff of Hampden; and the Court allowed the writ to be amended by directing it to the sheriff of Hampden. Upon that occasion the Court said; "This is a judicial writ, and the erroneous direction was a mere misprision of our own clerk. Judicial writs are more absolutely under the control of the Court than original writs." This case would have been directly in point, if the original writ in the present case had been directed to the sheriff of Aroostook county, and the clerk, in issuing the execution, had omitted that county. But can it be affirmed, that the omission of the clerk in the present case to insert Aroostook county, the county of Penobscot alone being in the original writ, was a departure or omission of his positive duty? Was he bound to take notice of the formation or boundaries of Aroostook county, or to extend the exigency of the execution to any other counties by name than those contained in the original writ, without some instruction from the plaintiff? It is quite possible, that some considerations of this nature may have entered as ingredients into the opinion of the State Court on this point. It is not, however, immaterial to observe, that in all the above cited cases, the question arose merely between the original parties, without any rights of third persons having intervened. The case of *Young v. Hosmer* (11 Mass. R. 89) admits of the same explanation, as does *Crofton v. Ilsey* (6 Greenl. R. 48); and the *Mechanics' Bank v. Minthorne* (19 John. R. 244). The case of *Hearsey v. Bradbury* (9 Mass. R. 95) is certainly of far more stringency. There,

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a writ was directed to the sheriff or his deputy; but the *ad damnum* being under seventy dollars, it might be served by a constable; and it was served by a constable. Upon the return of the writ, the direction was allowed to be amended by inserting a direction to a constable; and the Court treated the amendment as a matter of form. But here, again, the question was solely between the original parties. The case of *Close v. Gillespie* (3 Johns. R. 526) involved the rights of another judgment creditor, and, therefore, it stands upon a distinct ground. But there the error corrected was the omission of the attorney in the cause to put the defendant's name on the record to a plea in the case, it being the case of a warrant of attorney to confess judgment. This case, whatever may be its authority, stands upon a ground very different from the present, where the levy has been executed by an officer to whom it was not directed.

Thus much it seems proper to say upon the present occasion, by way of commentary upon some of the cases cited; although I wish distinctly to be understood as giving no opinion, what I should have done, sitting in the State Court.

But the Court may be pressed by other considerations; First, that here Cooper, at the time of his own levy, had full knowledge of the attachment of Pilsbury, and is, therefore, to be postponed to the subsequent levy of Pilsbury, by analogy to a purchaser, taking a conveyance with a knowledge of a prior unrecorded conveyance; Secondly, that as the deputy, who made the levy, was a deputy of the sheriff of the county of Penobscot, as well as of the county of Aroostook, the levy was good, because it might have been perfected by the sheriff of the county of Penobscot, where the original attachment was made, notwithstanding the land fell within the boundaries of the new county; Thirdly, that, at all events, the deputy, who made the levy, being a deputy of the county of Aroos-

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took, the levy was properly made by him, although, by mistake, the precept was not directed to him.

In respect to the first point, it is sufficient to say, that the rule as to a purchaser, claiming land with notice of a prior unrecorded conveyance, has never been applied to the case of two creditors, proceeding by suit *in invitum*, with a knowledge of the attachments of each other. In the latter case, each is understood to stand upon the very rights, which the law gives him, and is entitled, in a race of diligence, to get and hold any priority, which he lawfully may, however disadvantageous to the other attaching creditors, as each claims under the mere process of law. Besides ; knowledge of an utterly void or defective title will not affect the right of the purchaser to maintain his own conveyance with all its original validity. It does not confirm or establish such void or defective title ; but, at most, leaves it to avail as much as it may, in point of law and equity.

Then, as to the second point, I agree, that if the sheriff of Penobscot, or his deputy, had a right, *virtute officii*, because the original attachment was made on the land, while it was a part of the county of Penobscot, to execute the levy under the execution issuing on the judgment, notwithstanding the severance of the county, and the lands thereby falling within the county of Aroostook, then that the present levy may be supported, because the act of the deputy in the levy may be properly referred to the only authority, by which it could be lawfully made, and not by the other, *ut res magis valeat quam pereat*. But my difficulty is in admitting, that the sheriff of Penobscot had authority to complete the levy after the severance of the county. No provision to such an effect exists in the statutes creating the new county ; and, therefore, the point must be disposed of upon general principles.

At the common law, if a sheriff seizes goods on execution, and goes out of office before the sale of the goods on the exe-

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cution is completed, he may still proceed to sell the goods. So we find it laid down by Lord Holt in *Clerk v. Withers* (2 Ld. Raym. 1072, 1074), and in 2 Saund. R. 47, q., by Sergeant Williams, in his Note.¹ The reason assigned is, that the same sheriff, that begins an execution, must end it. And, by the Revised Statutes of Maine, ch. 104, § 21, all sheriffs and their deputies may execute all precepts in their hands at the time of their removal from office. But I am not aware of any provision of law, by which, when an attachment is made by a sheriff in office, if the execution does not come until another sheriff is in office, the execution is to be served by the former, and not by the latter officer.

But be this, as it may; Upon general principles it would seem, that a sheriff is limited in his levies upon real estate to such estate, as is within his county; for his rights and duties are strictly local. Unless, then, some statute has extended his authority to cases of lands without his county, it would seem, that his having made a prior attachment thereof while within the limits of his county, would not aid him; for in such a case by operation of law the land is removed beyond his jurisdiction. Suppose the sheriff of Penobscot county, after the attachment, had been removed, and a new sheriff had been appointed, would the new sheriff have had a right to perfect a levy upon the land attached, after it was set off to Aroostook county? Or should it be by the sheriff of Aroostook county? The strong inclination of my mind is, that it should be by the latter.

The third point is that, which was mainly relied on at the argument, and that is, that substantially the levy was well made, it being made by the proper officer, although the precept was not directed to him. And it is here, that the case of *Hearsey v Bradbury* (9 Mass. R. 95) is applied with great

¹ See also 2 Tidd, Pract. 9th ed. p. 1021 (1826).

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force. Assuming the authority of that case to be entirely satisfactory for the allowance of the amendment there made, by adding the direction of the precept to the officer, who served it, the difficulty still remains, what is the effect, where no such amendment has been allowed? Is not the act of the officer a mere nullity, if the precept is never addressed to him? If the State Court in the present case had allowed the amendment, it would have been decisive in favor of the demandant. But the State Court refused the amendment; and then the case stands upon the execution, as the service and levy by an officer, who was not authorized to serve it, because it was never addressed to him. Can such a service and levy, without authority, be maintainable upon any principles of law?

The case of *Means v. Osgood* (7 Greenl. R. 146) is very strong in point to show, that the Court, in allowing amendments on the returns of officers on levies of real estate, confine themselves to cases, where the question is mainly between the original parties, and the rights or levies of third persons have not intervened. The distinction is a sound one, and stands upon grounds, which cannot but commend it to the general approbation of the profession. That case also seems entirely decisive, that, unless the amendment is allowed, the levy, in a case like the present, must, *a fortiori*, be utterly void and unmaintainable. Upon the whole, although I have examined the case with an anxious desire to see, if Cooper's levy, considering the defect to be one wholly involuntary and by mistake, could be sustained, upon any principles of law, I confess myself unable to find any, on which to rest it, and therefore, I am of opinion, that judgment ought, upon the statement of facts, to be entered for the tenant.

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JOHN BRIGHT, IN EQUITY, v. JOHN W. BOYD.

A *bond fide* purchaser, for a valuable consideration, without notice of any defect in his title, who makes improvements and meliorations upon the estate, has a lien or charge upon the estate for the increased value, which is thereby given to the estate beyond its value without them, and a Court of Equity will enforce the lien or charge against the true owner, who recovers the estate in a suit at law against the purchaser.

THIS cause was formerly before the Court, and the decision then had, and the reasons therefor, are reported in 1 Story, Rep. 478, *et seq.* The interlocutory degree then made was as follows :

“*First Interlocutory Decree in the case of John Bright in Equity against Jno. W. Boyd.*—And now at this Term the cause came on to be heard upon the bill, answer, pleadings, evidence, and other proceedings in the cause, and was argued by counsel. On consideration whereof it is ordered, adjudged, and declared by the Court, that is to say, that it appears to the Court, that the plaintiff is the purchaser, for a valuable consideration, of a defective title, without notice of the defect therein, and that improvements have been made by the complainant, or his grantors, on the premises of the respondent, under a mistake of title, and that he is entitled to relief in Equity.

“That it be referred to a Master, if the parties do not otherwise agree, to ascertain the character and value of said improvements, by whom made, and at what time they were made. Also, that the Master ascertain and report of the value of the rents and profits of the land, on which said improvements are made, and state an account thereof. Also, to ascertain and report the present value of the said land without the improvements, and how far the value of said land is increased by said improvements.

“And that the Master is to ascertain the foregoing facts, as well by the examination of witnesses as by the examination of the parties, and by all other suitable proofs, and to make report thereof to the Court. And that the Master be clothed with all proper powers for the purposes aforesaid, and that further orders and decrees in the premises be reserved until the coming in of the report.”

At the present term (Oct. Term, 1843), the Master made his report as follows:

“*Report of the Master.*—The Master, to whom it was referred to ascertain the character and value of the improvements on the lot in controversy, by whom made, and at what time they were made, and to ascertain and report upon the value of the rents and profits of the land, on which said improvements are made, and state an account thereof; also, to ascertain and report the present value of the land without improvements; reports, that, as far as he has been able to ascertain, the improvements upon said lots were made by John E. Marshal. They consist of a double wooden tenement of two stories, which was built in the years 1834 and 1835, and completed in the early part of the summer of 1838; that the said improvements are worth nine hundred and seventy-five dollars, and that the land without the improvements would be worth at this time twenty-five dollars; and that the land, with the improvements, is now worth one thousand dollars, so that the value of the land is increased by the improvements, nine hundred and seventy-five dollars, and that, in his opinion, there would have been no rents or profits from said land, if no improvements had been made thereon.

“Fees \$5.00.

HENRY WARREN.”

“In my report, of which the within is a copy, I intend to value the whole lot of land without improvements at twenty-

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five dollars, and the whole improvements at nine hundred seventy-five dollars. HENRY WARREN."

The cause was now briefly argued by *Longfellow*, for the plaintiff, against the report, and by *F. Hobbs*, for the defendant, in favor of it.

STORY, J. — I have reflected a good deal upon the present subject ; and the views, expressed by me at the former hearing of this case, reported in 1 Story, R. 478, *et seq.* remain unchanged ; or rather, to express myself more accurately, have been thereby strengthened and confirmed. My judgment is, that the plaintiff is entitled to the full value of all the improvements and meliorations, which he has made upon the estate, to the extent of the additional value, which they have conferred upon the land. It appears by the Master's report, that the present value of the land with the improvements and meliorations is \$1000 ; and that the present value of the land without these improvements and meliorations is but \$25 ; so that in fact, the value of the land is increased thereby \$975. This latter sum, in my judgment, the plaintiff is entitled to, as a lien and charge on the land in its present condition. I wish, in coming to this conclusion, to be distinctly understood as affirming and maintaining the broad doctrine, as a doctrine of Equity, that, so far as an innocent purchaser for a valuable consideration, without notice of any infirmity in his title, has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge, before he is to be restored to his original rights in the land. This is the clear result of the Roman law ; and it has the most persuasive Equity, and, I may add, common sense and common justice, for its foundation. The Bet-

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terment Acts (as they are commonly called), of the States of Massachusetts and Maine, and of some other States, are founded upon the like Equity, and were manifestly intended to support it, even in suits at law for the recovery of the estate.

The report will, therefore, be accepted and allowed ; and a decree made in conformity to the present opinion.

The final decree was as follows : “ *Final Decree.* — And now, on coming in of the Master’s report, it is ordered, that the same be accepted and allowed.

“ And it is further ordered, adjudged, and declared, that the said improvements, to the value of nine hundred and seventy-five dollars, are a lien upon the whole of the premises described in the plaintiff’s bill, and that one quarter part of the said premises stand charged with one quarter of the said improvements.

“ And it is further ordered, that unless one quarter part of the said sum of nine hundred and seventy-five dollars is paid by the defendant to the complainant, by the next Term of the said Court, one quarter part of the whole of the said premises, with the improvements thereon, shall be sold, and the proceeds thereof, to an amount not exceeding one quarter of nine hundred and seventy-five dollars, shall be paid over to the complainant.

“ And it is further ordered, that all further orders and decrees in the premises be reserved until the further order of Court.”

HIRAM A. PITTS v. LUTHER WHITMAN.

WHERE the plaintiff, in the specification of his patent, described his invention to be "a new and useful improvement," whereas, in fact, it consisted of a combination of several improvements, distinctly set forth in the specification; *It was held*, that the patent was good, not only for the combination, but for each distinct improvement, so far as it was his invention, and that the descriptive words were to be construed in connection with the specification.

Where the plaintiff claimed, as his invention, "the construction and use of an endless apron, divided into troughs and cells, in a machine for cleaning grain, operating substantially in the way described," *It was held*, that the claim was for a combination of the endless apron with the machine for cleaning grain, and that, if the combination were new, it was patentable, although a part of the apparatus were old.

The Act of 1836, ch. 357, s. 11, relating to the recording of assignments of patents, is merely directory, for the protection of *bond fide* purchasers without notice, and does not require the recording of an assignment within three months, as a prerequisite to its validity.

It is immaterial whether an assignment of a patent, offered in evidence, was recorded before or after the suit was brought.

The Court is never bound to give an instruction to a jury on a point of law, in the precise form and manner in which it is put by counsel, but only in such a manner as comports with the real merits and justice of the case.

A motion having been made in arrest of judgment in this case, on the ground, that no description of the patent was set forth in the declaration, *It was held*, that the profert of the letters patent made them, when produced, a part of the declaration, and gave the invention all the requisite certainty.

THIS was a case for the infringement of a patent granted to Hiram A. Pitts & John A. Pitts, as inventors of "A new and useful improvement in the machine for threshing and cleaning grain." The patent was dated on the 29th of December, A. D. 1837. The writ was dated on 3d of October, 1840; and the plaintiff in his declaration alleged an assignment by John A. Pitts to himself of all his (John A. Pitts's) right in the

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invention, for, in, and within the State of Maine; and the breach alleged was, that the defendant, after the assignment, unlawfully made, used, and vended the said improvement in the said State of Maine. The cause was tried upon the general issue before the District Judge, at the last May Term; and a verdict was then taken for the plaintiff.

In order to understand the case, it is necessary to state, that the patent was for "A new and useful improvement in the machine for threshing and cleaning grain," and the specification annexed to the letters patent was in the following terms:

"To all whom it may concern. Be it known, that we, John A. Pitts and Hiram A. Pitts, of Winthrop, in the county of Kennebec and State of Maine, have invented a new and improved combination of machinery for separating grain from the straw and chaff, as it proceeds from the threshing machine; and we do hereby declare, that the following is a full and exact description thereof."

The specification then describes the invention, referring to an accompanying drawing. The claim was as follows:

"(1) We claim as our invention the construction and use of an endless apron, divided into troughs or cells, in a machine for cleaning grain, operating substantially in the way described. (2) We claim also the revolving rake for shaking out the straw, and the roller for throwing it off the machine, in combination with such a revolving apron, as set forth. (3) We claim the guard slats E in combination with a belt constructed substantially as above described; and, (4), the combination of the additional sieve and shoe with the elevator for carrying up the light grain in the manner and for the purpose herein set forth."

6.

A motion was afterwards made, on behalf of the defendant, in arrest of judgment, and, also, for a new trial, and was ar-

gued at the present Term, by *Preble* and *Samuel Fessenden* for the defendant, and by *Codman* and *Fox* for the plaintiff.

The motion in arrest of judgment was substantially as follows :

“ 1. Because it is not alleged in said writ what is the new and useful improvements in the machine for threshing and cleaning grain, which the plaintiff claims to have invented, and which he alleges, that the defendant has violated.

“ 2. Because the plaintiff has not, in his said writ and declaration, any where set forth what he does claim as his invention, or the extent of his claims.

“ 3. Because the plaintiff, in his said writ and declaration, has not set forth, or in any manner described the new and useful improvement in the machine for threshing and cleaning grain, which he claims as his invention.”

The motion for a new trial was founded upon the following grounds stated by the defendant : “ The plaintiff offered in evidence a deed from John A. Pitts to the plaintiff, dated April 17, 1839, and recorded in the Patent Office, April 19, 1841 ; to the admission of which the plaintiff objected, for the reason, that the said deed was not recorded within three months from its date, and because it was not recorded until long after the action was commenced. But the Judge admitted it as evidence to the jury, and overruled the objection. For which erroneous ruling, the defendant moves, that the verdict be set aside and a new trial be granted.

“ The Counsel for the defendant contended, that by his claim the plaintiff claimed, that John A. Pitts and Hiram A. Pitts did claim to be the inventors of said endless apron, so as aforesaid constructed, i. e. divided into troughs or cells, in a machine for cleaning grain, and operating substantially in the way described, and that if, in fact, they were not the inventors of an endless apron divided into troughs or cells, but

were the inventors only of an application of such an apron to a machine for threshing and cleaning grain in the way described, then, that their claim was too broad, and, therefore, void. And they contended further, that if, in fact, they were not the inventors of an endless apron, divided into troughs or cells, then the application of it to a machine for threshing and cleaning grain substantially in the way described, was not the subject of a patent, as an application of an old machine to a new use or purpose was not patentable. And the judge was requested to give the construction contended for by the defendant's counsel, to the said claim ; but the judge refused, and ruled, that the claim could not, and ought not to be so construed. That the true construction was, that the said Pittses did not claim to be the inventors of an endless apron or an endless apron of troughs or cells, but that they claimed it only in a machine for threshing and cleaning grain, operating substantially in the way described ; and that their claim was good and valid, as the inventors of its application to such a machine in the manner described. And for this ruling, which the defendant contends is erroneous, he moves the Court for a new trial.

“ The counsel for the defendant further contended, if an endless belt of troughs or cells was known and used at the time of, and prior to the supposed invention of said Pitts & Pitts, then the mere application of an endless belt of troughs or cells to the new purpose of separating straw and grain, in a machine for threshing and cleaning grain, is not the subject of a patent, and any patent taken out for the use of such a belt for that purpose is void. The Judge declined to give such instructions, for which cause the defendant moves for a new trial.

“ The counsel for the defendant further contended, that, if the claim of the plaintiff to the construction and use of an

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endless belt, with troughs or cells, embraces any other different form substantially of construction, than the one by him particularly specified, the claim, in that case, would be too broad, and the action could not be sustained. This instruction the Judge declined to give. For which cause, also, the plaintiff moves for a new trial."

There was also an Exception taken to another supposed ruling of the Judge at the trial, which was afterwards abandoned, as it turned out to be incorrectly stated, and therefore it is here omitted.

Preble and Fessenden, for the defendant, in their argument, mainly relied upon the grounds stated in the foregoing motions. They cited, Patent Act of 1836, ch. 357, § 11; *Wyeth v. Stone* (1 Story's R. 273, 295, 296); *Prouty v. Ruggles* (1 Story R. 568); *S. C.* (16 Peters R. 336).

Codman and Fox, for the plaintiff, argued as follows: To the objection, that plaintiff cannot maintain this action, because his deed from his co-patentee was not recorded within three months, and not till long after this suit was commenced, the answer is, that it is not necessary as between these parties. The defendant does not claim title by purchase, extent of execution, or otherwise; he resists the validity of the patent. It is enough, that it was recorded, before it was offered in evidence. The object of the requirement of the statute, that such a record should be made within three months, was to protect subsequent purchasers, &c. and to give sufficient time for first purchasers to have their deed recorded.

The case of *Wyeth v. Stone* (1 Story R. 273), cited by defendant, does not apply to this case. It was based upon the statute of 1793, which, in terms and substance, is materially different from the statute of 1836. See *United States v.*

Slade (2 Mason, 71); *Prescott v. Potter* (3 Pick. 391); *Welch v. Joy et al.* (13 Pick. 477); *Emerson v. Towle* (5 Greenl. 197).

Under the general Registry Statute of Massachusetts and Maine, it has been repeatedly held, and is well settled law, that notice or even possession is equivalent to registry. *Priest v. Rice* (1 Pick. 165); and see *Brooks v. Byam et al.* (1 Story 296).

As to the motion to set aside the verdict, we are unable to perceive any just ground of support for either branch of it; it is believed to be in strict conformity with both law and evidence. Moreover, there is no report of the evidence, and we believe that this Court cannot entertain the motion to set aside the verdict on the ground of its being against the evidence.

STORY, J. — There is no ground to support the motion in arrest of judgment, which indeed ought properly to be heard after the motion for a new trial, which, if granted, might supersede the other motion. The short answer to be given to the motion in arrest of judgment is, that the profert of the letters patent (of which the specification constitutes a part), makes the letters patent, when produced, a part of the declaration, and so gives all the certainty as to the invention and improvement patented, which is required by law. It would indeed be more formal to annex a copy of the letters patent and specification to the declaration, and to refer thereto in the declaration. But the common practice is according to the declaration in the present case; and there seems to be no substantial objection to it.

The first objection, taken upon the motion for a new trial is, that the deed of assignment from John A. Pitts to the plaintiff, dated on the 17th of April, 1838, was not recorded in the Patent Office until the 19th of April, 1841, after the present suit was commenced; whereas it ought to have

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been recorded within three months after the execution thereof. By the Patent Act of 1793, ch. 55, § 4, every assignment, when recorded in the office of the Secretary of State, was good to pass the title of the inventor, both as to right and responsibility; but no time whatever was prescribed within which the assignment was required to be made. By the 11th section of the act of 1836, ch. 357, it is provided, "That every patent shall be assignable in law, either as to the whole interest or any undivided part thereof, by any instrument in writing; which assignment, and also every grant and conveyance of an exclusive right under any patent to make and use, and to grant to others to make and use, the thing patented within and throughout any specified portion of the United States, shall be recorded in the Patent Office within three months from the execution thereof." Now, it is observable, that there are no words in this enactment, which declare, that the assignment, if not recorded, shall be utterly void; and the question, therefore, is, whether it is to be construed as indispensable to the validity of an assignment, that it should be recorded within the three months, as a *sine qua non*; or whether the statute is merely directory for the protection of purchasers. Upon the best reflection, which I have been able to bestow upon the subject, my opinion is, that the latter is the true interpretation and object of the provision. My reasons for this opinion are, the inconvenience, and difficulty, and mischiefs, which would arise upon any other construction. In the first place, it is difficult to say, why, as between the patentee and the assignee, the assignment ought not to be held good as a subsisting contract and conveyance, although it is never recorded by accident, or mistake, or design. Suppose the patentee has assigned his whole right to the assignee for a full and adequate consideration, and the assignment is not recorded within the three months, and the assignee should make and use the patented machine after-

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wards ; could the patentee maintain a suit against the assignee for such making or use as a breach of the patent, as if he had never parted with his right ? This would seem to be most inequitable and unjust ; and yet if the assignment became a nullity and utterly void by the non-recording within the three months, it would seem to follow as a legitimate consequence, that such suit would be maintainable. So strong is the objection to such a conclusion, that the learned counsel for the defendant admitted at the argument, that as between the patentee and the assignee, the assignment would be good, notwithstanding the omission to record it. If so, then it would seem difficult to see, why the assignment ought not to be held equally valid against a mere wrong-doer, piratically invading the patent right.

Let us take another case. Could the patentee maintain a suit against a mere wrong-doer, after the assignment was made, and he had thereby parted with all his interest, if the assignment was not duly recorded ? Certainly it must be conceded, that he could not, if the assignment did not thereby become a mere nullity, but was valid as between himself and the assignee ; for then there could accrue no damage to the patentee, and no infringement of his rights under the patent. Then, could the assignee, in such a case, maintain a suit for the infringement of his rights under the assignment ? If he could not, then he would have rights without any remedy. Nay, as upon this supposition, neither the patentee nor the assignee could maintain any suit for an infringement of the patent, the patent right itself would be utterly extinguished, in point of law, for all transferable purposes. Again ; could the assignee, in such a case, maintain a suit for a subsequent infringement against the patentee ? If he could, then the patentee would be in a worse predicament than a mere wrong-doer. If he could not, then the assignment would become,

in his hands, in a practical sense worthless, as it would be open to depredations on all sides.

On the contrary, if we construe the 10th section of the act to be merely directory, full effect is given to the apparent object of the provision, the protection of purchasers. Why should an assignment be required to be recorded at all? Certainly not for the benefit of the parties, or their privies; but solely for the protection of purchasers, who should become such, *bonâ fide*, for a valuable consideration, without notice of any prior assignment. By requiring the recording to be within three months, the act, in effect, allows that full period for the benefit of the assignee, without any imputation or impeachment of his title for *laches* in the intermediate time. If he fails to record the assignment within the three months, then every subsequent *bonâ fide* purchaser has a right to presume, that no assignment has been made within that period. If the assignment has not been recorded until after the three months, a prior purchaser ought, upon the ground of *laches*, to be preferred to the assignee. If he purchases after the assignment has been recorded, although not within the three months, the purchaser may justly be postponed, upon the ground of *mala fides*, or constructive notice of the assignment. In this way, as it seems to me, the true object of the provision is obtained, and no injustice is done to any party. In respect to mere wrong-doers, who have no pretence of right or title, it is difficult to see, what ground of policy or principle there can be in giving them the benefit of the objection of the non-recording of the assignment. They violate the patent right with their eyes open; and as they choose to act *in fraudem legis*, it ought to be no defence, that they meant to defraud or injure the patentee, and not the assignee. Indeed, if the defence were maintainable, it would seem to be wholly immaterial, whether they knew of the assignment or not.

In furtherance, then, of right, and justice, and the apparent

policy of the act, *ut res magis valeat quam pereat*, and in the absence of all language importing, that the assignment, if unrecorded, shall be deemed void, I construe the provision as to recording to be merely directory, for the protection of *bonâ fide* purchasers without notice. And assuming, that the recording within the three months is not a prerequisite to the validity of the assignment, it seems to me immaterial (even admitting, that a recording at some time is necessary), that it is not made until after the suit is brought. It is like the common case of a deed required by law to be registered, on which the plaintiff founds his title, where it is sufficient, if it be registered before the trial, although after the suit is brought ; for it is still admissible in evidence as a deed duly registered.

The next objection taken is to the ruling of the District Judge upon the point of the construction of the claim in the specification in the patent. The learned judge ruled " That the true construction of the patent was, that the Pittses did not claim to be the inventors of an endless apron, or an endless apron of troughs or cells. But the true construction must be, that they claimed it only in a machine for threshing and cleaning grain, operating substantially in the way described ; and that their claim was good and valid as the inventors of its application to such a machine in the manner described." I am of opinion, that the construction thus given by the learned Judge of the claim of the patentees in the specification is the true one. What is the language of the specification ? " We claim as our invention the construction and use of an endless apron, divided into troughs or cells, in a machine for cleaning grain, operating substantially in the way described ;" that is, described in the specification. It is, therefore, clear, that it was not a claim of an invention of an endless apron of troughs or cells ; but of an endless apron of troughs and cells combined with a particular threshing machine, described in the specification. If this combination was

new, and invented by the patentees, then it was valid in point of law, which is all that the learned judge purported to state. And this disposes in effect of the next objection ; for if the combination was new, it is a patentable matter, although a part of the apparatus might have been applied to similar purposes in other and different machines. Under such circumstances it would not be a mere application of an old apparatus to a new purpose, but a new combination of machinery, incorporating, in part, an old apparatus for a new purpose.

The third instruction, asked, and refused by the Court, is objectionable in several respects. It proceeds upon the assumption of the existence of facts, which it was no part of the duty of the Court to assume or affirm. It undertakes to put a construction upon the invention, as claimed by the patentees, which is not (as has been already suggested) correct. It separates the consideration of the endless belt of troughs from the other machinery, with which it was combined, as though it were claimed as a distinct invention, and not in combination, and asks the Court to give an instruction founded upon that supposition. It was no part of the duty of the Court thus to break up the case into fragments, or to give an instruction as to abstract points, not actually presented by the state of the cause. The like answer may be given for similar reasons to the fourth instruction asked and refused.

The fifth instruction, asked and refused, involved matter of fact, viz. the character of Parsons's machine, and in what respects it was identical with, and in what respects it differed from, the machine of the Pittses, and that of Whitman ; and therefore was properly refused ; for the learned Judge had no right to determine upon any such matters, or to give the instruction prayed for. The instruction upon this point supposed in the motion for a new trial to have been given by him, was in fact (as he states) never given. On the contrary, he gave the instruction in the form and manner, which are

stated by the counsel for the plaintiff in their written objection to the motion for a new trial. In short, he left the whole as a matter of fact for the consideration of the jury, with such observations on his own part, as were fit to be submitted by way of commentary on the evidence, for their consideration.

It may here be proper to add, that the Court is never bound to give an instruction to a jury upon a point of law, even when pertinent, and relevant to the fact of the case, precisely in the form and manner, in which it is put by counsel; for that may sometimes have a tendency to mislead the jury, and withdraw their attention from the merits of the case. All, that is the duty of the Court, is to give such instructions to the jury in point of law, as clearly arise upon the evidence, and are proper for the consideration of the jury, upon the issue before them, in such terms and in such a manner as shall comport with the real merits and justice of the case, and enable the jury to give a proper verdict in point of law. Having done this, the Court has discharged its entire duty, and is not bound to respond to instructions asked, which are of a more general form, or of an abstract nature, or are not necessary for a just decision of the cause.

Before closing this opinion, it is fit to take notice of an objection, raised in the argument at the bar on behalf of the defendant, that the present patent is professedly for "a new and useful improvement," and not for new and useful improvements (in the plural); and that consequently it covers only the whole combination in its entirety; and not the several improvements specified in the claim, separately and distinctly from each other. The conclusion, intended to be deduced from this argument, is, that inasmuch as the evidence did not show a violation of the whole combination, but of one only of the asserted improvements, therefore, the present suit is not maintainable. I cannot assent either to the premises, or to the conclusion; and, in my judgment, each is unsupportable in

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point of law. There is, in my judgment, no difficulty in maintaining the validity of a patent (as in the present case), for a machine combining several distinct improvements, each of which is the invention of the patentee, and also of including in the same patent a right to each of these several and distinct improvements. In other words, the patentee may in such a case take out a valid patent for the combination, and also include therein a right to each distinct improvement severally contained in the same machine. Such was the doctrine maintained by this Court in *Wyeth v. Stone* (1 Story R. 273); and it stands confirmed by the obvious intent of the 9th section of the Patent Act of 1837, ch. 45, which gives to the patentee a right of action for a piratical use of any one of his invented improvements, which is distinctly stated in his patent, although he may, by mistake, accident, or inadvertence, have claimed others in his specification, of which he was not the inventor.

In construing a patent for an invention we are not to look alone to the descriptive words contained in the letters patent, but we are to construe those words in connection with the specification, which in our law is always annexed to and made a part of the letters patent. Here, indeed, the letters patent described the invention to be "a new and useful improvement (this is the common formulary) in the machine for threshing and cleaning grain;" but then it is afterwards added, "a description whereof is given in the words of the said John A. Pitts and Hiram A. Pitts, in the schedule hereto annexed, and is made a part of these presents." So, that for the nature and character of the improvement and the claim of the invention we are to look to the specification. Now, in the specification, the patentees begin by saying, that they "have invented a new and improved combination of machinery for separating grain from the straw and chaff, as it proceeds from the threshing machine;" so that we here clearly see, that the patentees

claim the entire combination of the machinery as new. In the summing up of their invention they claim four distinct improvements in the machinery, as their invention. The words are : " We claim as our invention, (1). The construction and use of an endless apron divided into troughs or cells in a machine for cleaning grain, operating substantially in the way described (i. e., in the specification). (2). We claim also the revolving rake for shaking out the straw, and the roller for throwing it off the machine, in combination with such a revolving apron as set forth. (3). We claim the guard slats, E, in combination with a belt constructed substantially as above described ; and, (4). The combination of the additional sieve and shoe, with the elevator for carrying up the light grain in the manner and for the purpose herein set forth." It is plain, therefore, that the patentees not only claim the entire machinery in combination, but also the four improvements above enumerated as their invention. And if they are their invention, there is no objection, in point of law, to their claim. And a violation of any one of the specified improvements, without any violation of the others, by the defendant, is sufficient to entitle the patentees, or their assignees, to an action for the infringement.

So that in every way, in which I am able to contemplate the case, the motion for a new trial and in arrest of judgment ought to be over-ruled. The District Judge concurs in this opinion, and, therefore, the motion is over-ruled.

Upham v. Brooks *et al.*

NATHANIEL G. UPHAM

v.

HENRIETTA L. BROOKS AND OTHERS.

WHERE, in a Bill in Equity, to redeem a mortgage given to secure the mortgagee against an incumbrance upon another estate purchased by him, the plaintiff claimed as owner of the Equity of Redemption, against the defendant, who was assignee of the mortgage, and the bill did not set forth, that the condition of the mortgage had been fully performed and the incumbrance extinguished; *It was held*, on demurrer, that although, in law, the mortgagor could not recover the land mortgaged from the mortgagee, and those in possession under him without an actual extinguishment of the incumbrance, yet that, in Equity, he was entitled to maintain a bill to redeem upon an offer to redeem, and proving himself able and ready to discharge the incumbrance and procure releases thereof, and of claims on account thereof.

Where A. was the legal owner of land, which he held in trust for B. as security for advances made by him on account of the purchase by B., *It was held*, that A was a necessary party to a bill brought by B. in respect of a claim arising upon such lands; and, as the bill did not make him a party, *It was held*, on demurrer, not to be maintainable.

BILL in Equity. The bill was, in substance, as follows: "The bill alleges that the orator, Nathaniel G. Upham, a citizen of Concord, in the county of Merrimack, and State of New Hampshire, is the owner of a right in Equity of redemption of a certain tract of land, situate on Pleasant street, in Portland, in the State of Maine, known as the John Mussey homestead, and sets forth:

"That said premises were the property of one Charles Mussey, now a citizen of Painsville, in the county of Geauga, and State of Ohio; and that on the 16th December, 1834, they were conveyed with full covenants of warranty by said Mussey to Robert Boyd, in part consideration of a conveyance by said Boyd to Mussey, his heirs and assigns, of one quarter part of 11000 acres of land in Stetson, in the county of Penobscot, and State of Maine.

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“The bill further alleges, that the Stetson land, at the time of said conveyance by Boyd, was under incumbrance, by mortgage, to Amasa Stetson, of Dorchester, Massachusetts; and, to secure the payment of said mortgage, the said Boyd, at the time of said conveyance, re-conveyed the Portland tract aforesaid to said Mussey in mortgage, with condition, that he would pay or cause to be paid to said Amasa the amount of his incumbrance on said Stetson land.

“The bill further alleges, that afterwards, on the 16th May, 1835, said Mussey conveyed to Oliver B. Dorrance, and Marshall French and their assigns, with full covenants of warranty, said land in Stetson, and that subsequently said Dorrance and French entered into a contract with said Upham, the orator, to convey to him two thousand and twenty-four acres of said land, and received of him in consideration therefor large sums of money, amounting in all to more than seven thousand dollars; and in consideration of a further payment made in behalf of the orator by one Thomas C. Upham, for the remaining sum due on said land, the said Dorrance and French, on the 31st of October, 1837, conveyed said two thousand and twenty-four acres of land to said Thomas C. Upham by deed of warranty, which he, the said Upham, holds in trust for the orator, subject to the payment of the advance so made by said Thomas.

“And the orator further alleges, that said Mussey, contriving and intending to prevent the due application of the Portland tract, which was mortgaged as aforesaid, to secure to said Mussey and his assigns the covenants of warranty of said Stetson land, caused an assignment of said mortgage to be made to one Joshua Richardson, on the 16th November, 1838, which was long after said Mussey's sale of said Stetson land, with full covenants of warranty, to said Dorrance and French, and their assigns; and subsequently, with a similar fraudulent design, caused said mortgage to be further assigned by said Richardson to one Henrietta L. Brooks, a resident and citizen

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of Portland, in the county of Cumberland and State of Maine, on the 19th June, 1839, both which assignments are duly executed, acknowledged and recorded in the registry of deeds in said Cumberland, and the said Henrietta now holds said mortgaged property as a pretended security for some debt or claim, which she has against said Mussey, and which the orator alleges is wholly disconnected with any terms or conditions of said mortgage, and is fraudulent and groundless, a claim under the same. Yet notwithstanding this, the said Richardson entered on said premises for condition broken, and to foreclose said mortgage; and said Henrietta has received the rents and profits of said estate from November, 1838, to the time of the filing of this bill, to be applied in payment of said pretended debt, and claims that said mortgage would have been fully foreclosed by her, had she not executed a writing extending the equity of redemption of the same to, and including the date hereof, and that from and after this date all right in equity of redeeming said estate will fully cease.

“ The orator further alleges, that on account of the neglect and refusal of said Mussey to relieve the Stetson land of the mortgage to said Amasa Stetson, agreeably to his covenants with said Dorrance and French and his assigns, and from other causes, they, the said Dorrance and French, have been unable to take up said mortgage in order that the orator might derive any benefit by his title aforesaid from them; and the said Dorrance and French, and the said Mussey and Boyd, have severally, since said time, become insolvent, and said Amasa Stetson and his assigns have entered upon said Stetson land, and have foreclosed his mortgage thereon, so that all title derived to the orator from said Mussey, and said Dorrance and French, has utterly failed; and your orator is left remediless for any part of his large advance as aforesaid, unless the said Mussey, or his assigns, shall cause the mortgage of said

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Portland tract to be applied in discharge of the covenants of warranty of said Stetson land, according to the design of said conveyance.

“And the orator further alleges, as heretofore named in said bill, that he is the holder and owner of the right in equity of redemption of said mortgage from said Boyd to said Mussey, conveyed to the orator by quitclaim deed of said Boyd, duly executed, acknowledged and recorded, and that said Mussey hath not been damnified or injured by any claim or demand by his grantees, or their assigns, of said land in Stetson, on account of his said covenants of warranty of the same, and that the orator, as holder and owner of said equity, on the 20th January inst. made a demand in writing on said Henrietta L. Brooks, and on this 21st of January inst. on the attorney of said Mussey, for a true account of the sum due, if any, on the mortgage aforesaid, and of the rents and profits of said mortgaged estate, and tendered to each of them the sum of twenty dollars for any nominal breach of said mortgage, and full discharges and releases from the said Mussey's grantees, and their assigns, of all claims against him, the said Mussey, and any other person or persons for his or their liability, as warrantor of said Stetson land, as a full discharge and release, so far as concerned said Mussey, of said Stetson mortgage, and of all claim to hold said Portland land therefor; and requested of said Henrietta, and also of the attorney of said Mussey, a full discharge and release of the mortgage on said Portland tract, which tender and releases as aforesaid are still proffered here in Court; but the said Henrietta and said Mussey severally refused to discharge said mortgage, and said Henrietta claimed and still claims to hold said mortgaged premises for debts and sums in no manner secured by said mortgage, alleging that said Mussey, on the 19th June, 1839, by his promissory note owed her \$800; which, since said time, up to April 16th, 1840, had been reduced by the rents

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and profits of said mortgaged premises to \$666.83, when a new note was given her by said Mussey for that amount, and she claims to hold said mortgaged premises for said sum and the interest thereon, and that said mortgage will be foreclosed by her, if said sum is not paid on this 21st January inst. ; and said Henrietta accounts for no rents or profits since said 16th April, 1840, and assigns no reasons why the same have not accrued and been collected by her.

“All which claims the orator charges to be wholly unsustained, and that all liability or claim of damage by said Mussey or said Henrietta, under said mortgage of said Portland tract, has wholly ceased, and that said mortgage is fully discharged.

“And the orator prays a decree of this Court, requiring said Henrietta to execute and deliver a discharge of said mortgage on filing of the releases specified as aforesaid, and that said Henrietta render a full statement of all profits and income received from said mortgaged premises, and account therefor to your orator ; and that he may have such further and other relief in the premises as may seem meet to said honorable Court.”

To the bill there was a demurrer. The demurrer was argued, at this Term, by *Rand* and *W. P. Fessenden*, for the defendant, Brooks ; and by *F. J. O. Smith*, for the plaintiff.

The argument for the defendant was as follows: 1. The complainant has no title to bring this Bill. If he claim as owner of the Equity of redemption from Boyd, the answer is, that Boyd could only sustain a bill, when the *condition* was performed. This cannot be allowed. Mussey conveyed with warranty to French and Dorrance. They conveyed with warranty to T. C. Upham. Stetson has foreclosed. T. C. Up-

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ham, then, has his claim upon the covenants in Mussey's deed, which passed with the land to him.

2. He cannot claim as the owner of the Stetson land at any time ; for he never had any such interest in it as would enable him to bring a suit. The conveyance was made to T. C. Upham. *He* has not released his claim upon the covenants in Mussey's deed. Even supposing Dorrance and French had given a release, such an instrument would be merely *inoperative*, for, having conveyed, they could not release the covenants, which had passed to T. C. Upham. T. C. Upham's remedy in the covenants is yet good, therefore, against Mussey. And so would be the remedy of Dorrance and French, if Upham asserted his claims upon the covenants in their deed.

3. It is not averred, that any release from Dorrance and French was *tendered* or *offered*. It was merely *proposed*. And such a paper, if tendered, should be set forth in substance, that the Court might judge of its efficiency.

STORY, J. — It is not necessary to consider any part of the argument of the plaintiff, which is properly addressed to the merits of the case, because the objections, which have been urged on behalf of the defendants, at the bar, mainly turn upon considerations of a preliminary nature. Two objections have been urged, (1). That there is a want of the proper parties before the Court to sustain the bill. (2). That, upon the plaintiff's own showing, he has not made out a sufficient case for relief in Equity. The latter objection mainly stands upon this, that the plaintiff has not shown, that, at the time of the commencement of the present suit, the claim on the mortgage, stated in the bill, was extinguished, or otherwise satisfied ; and unless it was, he has no title to relief. The argument is, that the plaintiff claims, as owner of the Equity of redemption from Boyd ; and unless the condition of the mortgage has been fully performed, the plaintiff has no more right to redeem than Boyd ; and upon

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the facts stated in the bill, the condition has not been performed, nor the incumbrance on the lands in Stetson extinguished. If this were a case at law, the objection might well be maintained ; for until an actual extinguishment of the incumbrance, the mortgage would stand good, and the mortgagor could not recover the land mortgaged from the mortgagee, or those in possession under him. But this is a case in Equity ; and although the language of the bill is very loose, and indeterminate on this head, yet it is sufficiently apparent, that the plaintiff means, by the allegations in the bill, to insist, that the mortgage either has been extinguished or satisfied, or that he is now ready and willing to satisfy whatever may be due thereon. And, besides ; admitting that at the commencement of the suit the plaintiff had not absolutely procured a release of the covenants of warranty in the deeds of the Stetson lands by 'Mussey, and by his grantees to T. C. Upham, and had not absolutely extinguished the mortgage ; still, if he is now ready and able to show that it is extinguished, and that he has procured, or can procure, the proper releases from the proper parties of those covenants, I am not prepared to say, that, if this were satisfactorily made out, upon a reference to a master, the plaintiff might not, under the present bill, be entitled to relief. This is often done in cases of bills for specific performance, where the plaintiff could not make a good title at the time of filing the bill ; but is able to do so before, or at the hearing. At least, I should hesitate to decide this point upon the present demurrer. And at all events, I should give the plaintiff leave to amend the bill, so as to bring all the facts more completely before the Court.

But the other objection is fatal to the bill in its present shape. It is manifest from the bill, that Thomas C. Upham is the legal owner of the Stetson lands under the conveyance to him ; and admitting, that he holds the lands, partly in trust for the plaintiff, and partly for himself, as security for ad-

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vances made by him on account of the purchase, it is plain, that he is a necessary and proper party to the bill. He would be a proper party, as trustee, to a bill bought by his *cestui que trust*. And he is also a proper party to represent and protect his own personal interest in the Stetson lands. Until his demands are satisfied, he is not compellable to surrender the lands to the plaintiff, nor can the covenants of warranty in the deed to him be deemed extinguished. And if not extinguished, how can the present bill be maintained? It appears to me, therefore, that before this Court can proceed further in this case, Thomas C. Upham must be made a party thereto.

There are some other deficiencies in the structure of the bill, which may require to be examined and considered by counsel. But at present, I shall do no more than declare, that the demurrer be allowed, with costs to the defendant, for the want of proper parties; and if the plaintiff wishes, he may have leave to amend; otherwise the bill will be dismissed.

Demurrer allowed.

MITCHELL, ASSIGNEE OF ROPES, v. WINSLOW AND OTHERS.

ASSIGNEES in bankruptcy, except in cases of fraud, take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and they are affected with all the equities, which would affect the bankrupt himself, if he were asserting those rights and interests.

To make a grant or assignment valid at law, the thing, which is the subject of it, must have an existence, actual or potential, at the time of such grant or assignment. A mere possibility is not assignable.

But Courts of Equity support assignments, not only of choses in action, but of contingent interests and expectations, and also of things, which have no present actual potential existence, but rest in mere possibility only.

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Where a mortgage or a lien is created on chattels by contract, it is competent for the parties to agree, that the possession and use thereof shall be retained by the mortgagor until the breach of the condition, or by the debtor until the creditor shall assert his rights against it as a security for the debt.

A. and B. being engaged, in 1839, in the manufacture of cutlery, borrowed of C. a sum of money, payable in four years, with interest semi-annually, and on the same day gave him a deed of all the machinery in their manufactory, with all the tools and implements of every kind thereunto belonging and appertaining, together with all the tools and machinery for the use of the said manufactory, *which they might at any time purchase for four years from that date, and also all the stock, which they might manufacture or purchase during the said four years.* On the 26th of August, 1842, A. and B. filed their petition to be declared bankrupts, and subsequently were so declared, and an assignee was appointed. On July 16th, 1842, for breach of the conditions of the mortgage, the agent of C. took possession of the property, including the machinery, &c. which were in the possession of the factory when the mortgage was made, and also machinery, tools, and stock in trade, which had been made and purchased after the execution of the mortgage. On petition of the assignee in bankruptcy of A. and B. for an order of Court authorizing him to take possession, *It was held:*

1. That the mortgage and the possession taken on July 16th, 1842, constituted such a lien in favor of the mortgagee to the property acquired subsequent to the time of executing the mortgage, as is protected under the provision in the second section of the Bankrupt Act.
3. That such stipulations in a mortgage, in regard to property subsequently acquired, protect such property from other creditors of the mortgagor.
3. *Quers*, as to the effect at law of such stipulations, in a controversy between a first and second mortgagee, as to property acquired, and *in esse* after the execution of the first mortgage, and before the execution of the second, both the mortgagees being *bond fide* purchasers for a valuable consideration, and the second mortgagee having no notice of the prior incumbrance.

THIS was a petition of Mitchell, assignee of George and David N. Ropes, praying for an order of Court, authorizing him to take possession of certain property in the possession of Neal Dow, one of the respondents, and alleged to belong to the estate of the bankrupts. The facts were these; in 1839, the Messrs. Ropes were engaged in the manufacture of cutlery in

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Westbrook, and on the first of December of that year, borrowed of Jeremiah Winslow, of Havre, in the kingdom of France, \$15,000, payable in four years, with interest semi-annually, and on the same day made and executed a deed, conveying to Winslow "all and singular all the machinery of every kind, which is in and belonging to our cutlery manufactory at Saccarappa, in Westbrook, with all the tools and implements of every kind thereunto belonging and appertaining, together with all the tools and machinery for the use of said manufactory, which we may at any time purchase for four years from this date, and also all the stock which we may manufacture or purchase during said four years. To have and to hold, &c." (with covenants of title and warranty, &c.) "Provided, nevertheless, that if the Ropeses paid to Winslow, within four years, the principal sum borrowed, with interest, semi-annually, then the deed, with certain notes of hand given to secure the same, to be void. Provided, also, until default of or in the payment of said sums of money, or of some part thereof, or of the interest therefor, contrary to the true intent and meaning of the preceding proviso, it shall and may be lawful to and for the said George and David N. Ropes, their heirs and assigns, quietly and peaceably, to hold and enjoy, all and singular the premises hereby granted, and to secure and take the rents and profits therefor, to and for their own use and benefit, without denial or interruption of or by the said Jeremiah, his heirs or assigns, or any other person or persons claiming by or under him." This deed was duly recorded in the records of the town of Westbrook, pursuant to the provision of the law of the State. On the 12th of July, 1842, the bankrupts stopped payment, and on the 26th of August, filed their petition to take the benefit of the bankrupt law, and were duly declared bankrupts by a decree of the Court, on the 25th of October, 1842. On the 16th of July, 1842, the interest on the notes being in arrear and unpaid,

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Nathan Winslow, as the agent of Jeremiah, who was then absent from the country, took possession of the property, and on the — of October, before the filing of the petition of the assignee of the Ropeses, sold the property to Neal Dow.

The bankrupts continued their business up to the 12th of July last, when they stopped payment, and in the property on hand on the 16th of July, when the agent of Winslow took possession for breach of the conditions of the mortgage, were included the machinery and tools, which were in the factory, and in possession of the bankrupts, when the deed was executed, and also, other machinery, tools, and stock in trade, which had been made and purchased after the execution of the deed.

The case came on to be heard in the District Court, on a petition and answer, and the District Judge ordered the following questions, arising on the facts stated in the petition and answer, to be adjourned into the Circuit Court for a final decision.

1. Whether the deed of mortgage executed by George and David N. Ropes, on the first of December, 1839, together with possession, taken July 16th, 1842, by N. Winslow as agent of Jeremiah Winslow, created such a lien in favor of the mortgagee, on the machinery, tools and stock in trade, acquired by the mortgagors, either by purchase or otherwise, and put into the factory subsequent to the time of executing the mortgage deed, as is protected under the proviso in the second section of the bankrupt law.

2. Whether, admitting, that as between the mortgagor and mortgagee, the stipulations of the contract might be a good and sufficient authority for the mortgagee to take possession of, and apply the subsequently acquired machinery, tools and stock, to the payment of the debt, such stipulations in a deed of mortgage do protect such property from other creditors of the mortgagor.

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The case was argued at this Term, by *Preble* for the assignee, and by *Fox* for the respondent.

Preble, after citing and relying upon *Goodenow*, administrator, v. *Dunn*, administratrix, decided by the Supreme Court of Maine, and not then reported, (since reported in 21 Maine R. 86), and upon *Winslow v. The Merchants' Insurance Company*, decided by the Supreme Court of Massachusetts, and not then reported (since reported in 4 Metcalf, 306), but of both of which manuscript copies were produced, referred to the cases of *Sumner v. Hamlet* (12 Pick. R. 76); and *Macomber v. Parker* (14 Pick. R. 497); and *Leslie v. Guthrie* (1 Bing. New Cas. 697); and contended, that they were all distinguishable from the present case. In *Sumner v. Hamlet*, the goods were *in esse*, and were selected and set apart, as security for the creditor. In *Macomber v. Parker*, the lessees, the creditors, were in possession of the brick-yard, where the bricks were made, and held by them as security for advances made by their debtor, who was employed to make and sell the bricks upon certain terms, and to account for the proceeds to the creditors. In *Leslie v. Guthrie*, the assignment was of the freight for a then contemplated voyage of the ship, and was in the course of being earned. But it was clear, that the freight of a ship could not be permanently and indefinitely separated from the ship itself. *Robinson v. Macdonnell* (5 Maule & Selw. 228).

The present case is different from all these cases. Here the mortgage is not only of property now *in esse*, but of future property, which should come into the factory for four years, and the present and future stock purchased for the factory, within the same period. Yet the mortgagors were to hold and enjoy all the mortgaged premises, and to take the rents and profits thereof, present and future, for their own use and benefit, until there should be a breach of the condition. This gave the mortgagors a complete power and dominion over the

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whole mortgaged property, and is inconsistent with the assumed rights of the mortgagee, and cannot, in point of law, be valid. How can the mortgagee have a right to the manufactured stock, when the mortgagors have full right to sell it, from time to time, for their own use: Even if stipulations of this sort were valid between the parties, they could not be binding as to creditors, and certainly not in bankruptcy against the assignee. It would be against the policy of the bankrupt act to give effect to such transactions. The mortgage may be good as to the machinery and stock, existing at the time of its execution, but not as to future stock or future machinery.

Fox, for the respondent, argued, that the assignment was valid throughout.

STORY, J. — Two questions are presented for the consideration of the Court. (1). Whether the present mortgage created a valid lien, in favor of the mortgagee, upon the machinery, tools, and stock in trade, acquired by the mortgagors, and put into the factory after the execution of the mortgage, within the true intent and meaning of the proviso in the second section of the bankrupt act of 1841, ch. 9. (2). Whether, admitting the stipulations of the mortgage might, as against the mortgagor, be a good and sufficient authority to the mortgagee to take possession of, and apply the subsequently acquired machinery, tools, and stock, to the payment of the debt due to him, the mortgage is good, so as to protect the property against the claims of the other creditors of the bankrupts.

The proviso of the bankrupt act, above alluded to, is in the following words: "And provided, also, that nothing in this act contained, shall be construed to annul, destroy or impair any lawful rights of married women, or any liens, mortgages

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or other securities on property, real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." I am not aware, that the present mortgage has been contended to be inconsistent with any thing contained in any section of the act. It was executed long before the bankrupt act was in existence; and there is no pretence to say, that it is designedly fraudulent, or that the mortgagee has waived any of his rights under the mortgage.

The present is a mortgage of personal property, and has been duly recorded according to the act of 1839, ch. 390, of the State of Maine (which is substantially in the same language as the act of Massachusetts on the same subject), and no objection arises on this head. The question, therefore, in effect, resolves itself into this, whether the mortgage, *quoad* future machinery, tools, and stock in trade, is a valid mortgage or lien, by the laws of the State of Maine, as between the parties themselves, and also as between the mortgagee and the creditors of the mortgagors. If it be valid, either at law or in equity (it is wholly immaterial which), then the decision must be in favor of the respondent; otherwise, it must be in favor of the assignee.

It is material here to state, that the present is not a controversy between a first and second mortgagee, as to property acquired and *in esse* after the execution of the first mortgage, and before the time of the execution of the second mortgage, both the mortgagees being *bona fide* purchasers for a valuable consideration, and the second mortgagee having no notice of the prior incumbrance. That might, at law, present a very different question, and is precisely that which is understood to have been decided in the case of *Winslow v. The Merchants' Insurance Company* in Massachusetts. Neither is this a controversy between a mortgagee of a thing in building (as, for example, a ship in building), before it is completed, and a

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subsequent attaching creditor, or a subsequent purchaser, after it is completed, which seems to have been the important point in *Goodenow*, administrator, v. *Dunn*, administratrix, and *Burney v. Amee* (8 Pick. R. 236), and which might, also, at law, admit of very different considerations. The present is a question between the assignee of a bankrupt, acting for the benefit of all the creditors, and the mortgagee, claiming title under his mortgage; and it arises upon a petition, partaking of the character of a summary proceeding in equity, and not in a suit at the common law, or governed by its principles. Now, it is most material to bear in mind, under this aspect of the case, that it is a well-established doctrine, that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and, consequently, they are affected with all the equities, which would affect the bankrupt himself, if he were asserting those rights and interests. This was expressly laid down by Lord Hardwicke in *Brown v. Heathcote* (1 Atkyns R. 160, 162), where he said; "The ground, that the Court go upon, is this, that assignees of bankrupts, though they are trustees for the creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could. Therefore, assignments of choses in action for a valuable consideration, have been held good against such assignees." The same doctrine was recognised by his Lordship, in *Jewson v. Moulson* (2 Atk. 417, 420). Sir William Grant [Master of the Rolls], in *Mitford v. Mitford* (9 Ves. 87, 100), said; "I have always understood the assignments from the commissioners, like any other assignment by operation of law, passed his (the bankrupt's) rights, precisely in the same plight and condition as he possessed them. Even where a complete title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was

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liable to. This shows, that they are not considered purchasers for a valuable consideration, in the proper sense of the words. Indeed, a distinction has been constantly taken between them and a particular assignee for a valuable consideration; and the former are placed in the same class, as voluntary assignees and personal representatives." The same doctrine was held by Lord Thurlow in *Worrall v. Marlar*, reported in Mr. Coxe's Note to 1 Peere Will. R. 459. It has ever since been firmly adhered to;¹ and has been fully recognised at law, in cases of bankruptcy.²

It may be admitted to be true, what, indeed, seems to be the result of the authorities cited at the bar, as well as of others equally entitled to respect, that to make a grant or assignment valid at law, the thing, which is the subject of it, must have an existence, actual or potential, at the time of such grant or assignment; and that a mere possibility is not assignable;³ although, perhaps, the doctrine may require some qualifications under special circumstances, as for example, in cases of the assignment of freight in the course of earning at the time of the assignment, as is shown in the case of *Leslie v. Guthrie* (1 Bing. New Cas. 697, 708, 709). But this admission will carry us but a very little way in the present case. For here the true question is, not whether the assignment of

¹ See *Parker & Blanchard v. Muggridge* (5 Law Reporter, 358); 1 Cooke Bank. Law, ch. 7, § 2, p. 267, to p. 270, 4th, edit. 1799; 1 Deacon on Bank. Laws, ch. 10, § 3, p. 320, 321, edit. 1827; 2 Story on Eq. Jurisp. § 1229, § 1411.

² Lord Chief Justice Willes, in *Scott v. Surman* (Willes R. 402), and the reporter's note; *Gladstone v. Hadwen* (1 M. & Selw. 517, 526); Com. Dig. Bankrupt D. 19; *Leslie v. Guthrie* (1 Bing. New Cas. 697); *Carvalho v. Burn* (4 Barn. & Adolp. 382, 393); *Meyer v. Sharpe*, (5 Taunt. R. 74); *Simond v. Hibbert* (1 Russ. & Mylne, 729).

³ *Wood & Foster's Case* (1 Leon. R. 42); *Grantham v. Hawley* (Hob. R. 132); *Robinson v. Macdonnell* (5 Maule & Selw. 228); Com. Dig. Assignment, c. 3, Grant, D.

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the property to be acquired *in futuro*, is good at law, but whether it is good in equity ; for if it be, then, independently of any fraud (which is not pretended), as the assignee can take only what the bankrupt had a title to, subject to all equities, it follows, as a matter of course, that the petitioner (the assignee) has no claim, on which he can found himself for relief under his petition. So that the question is, in reality, narrowed down to the mere consideration of this, whether the present mortgage as to the future machinery, tools, and stock in trade, to be put into the factory (for there is no controversy as to those *in esse* at the time of the assignment), is valid or not against the mortgagor.

Upon the best consideration, which I am able to give the subject, I think it is good and valid. Courts of Equity do not, like Courts of Law, confine themselves to the giving of effect to assignments of rights and interests, which are absolutely fixed and *in esse*. On the contrary, they support assignments, not only of choses in action, but of contingent interests and expectancies, and also of things, which have no present actual or potential existence, but rest in mere possibility only. In respect to the latter, it is true, that the assignment can have no positive operation to transfer, *in presenti*, property in things not *in esse* ; but it operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come *in esse* ; and it may be enforced as such a contract *in rem*, in equity. Lord Hardwicke, in *Wright v. Wright* (1 Ves. R. 409, 411), expressly recognised this doctrine ; and said, that an assignment of a contingent interest or possibility of an inheritance was equally allowable with an assignment of a possibility of a personal thing or chattel real. And he added ; “ An assignment always operates by way of agreement or contract, amounting, in the consideration of this Court, to this, that one agrees with another to transfer, and make good that right or interest, which is made good here by

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way of agreement." In the very case, then before him, he admitted, that the assignor had no immediate claim or demand, but a mere possibility in the property assigned, and that it was well assigned by the word "claim," which well described it, *in presenti* and *in futuro*. He also relied on the case of *Beckley v. Newland* (2 P. Will. 182), which (he said) was an agreement on marriage to settle all such lands as came to the party by descent or otherwise from his father; and it was carried into effect by the Court, notwithstanding an expectancy of an heir at law is less than a possibility;¹ and *Hobson v. Trevor* (2 P. Will. R. 191), was fully to the same effect. In *Carleton v. Leighton* (3 Meriv. R. 667), Lord Eldon is said to have held, that the expectancy of an heir, presumptive or apparent, was not an interest or possibility, nor was capable of being made the subject of assignment or contract. But there is some reason to doubt the accuracy of the language as to assignment or contract; for he is reported immediately to have added, that the cases cited (referring to the cases of *Beckley v. Newland*, and *Hobson v. Trevor*), were cases of covenant to settle or assign property, which should fall to the covenantor; where the interest, which passed by the covenant, was not an interest in the land, but a right under the contract. This is strictly true, but still the contract was obligatory and sufficient to enforce a specific performance thereof. In the case of *Carleton v. Leighton*, the sole question was, whether the mere expectancy of an heir, who became bankrupt, passed by the assignment of the commis-

¹ The case of *Beckley v. Newland* (2 P. Will. 182), was not exactly as stated by Lord Hardwicke. But it was an agreement between two survivors, who had married two sisters, to divide equally between them whatever should be left to them by the father of their wives. But the principle was the same. The case of *Hobson v. Trevor* (2 P. Will. 191), was that probably in Lord Hardwicke's mind. See also 2 Story Eq. Jurisp. § 1040 b. and note.

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sioners. Lord Eldon held, that it did not ; for it was not an interest or even a possibility in the land. It seems clear, that the language of Lord Eldon ought to receive some modification from other language used by him on other occasions. Thus, in *Lord Dursley v. Fitzhardinge* (6 Ves. 260, 261), he expressly admitted, that an heir or the next of kin might enter into contracts with respect to their expectations and possibilities, the evidence upon which they might perpetuate ; for the law would frame an interest in respect of the contract. Again, *In Re, The Ship Warre* (8 Price R. 269, Note), in reference to the doctrine of Lord Ellenborough in *Robinson v. Macdonnell* (5 M. and Selw. 228), Lord Eldon said, that he should find it extremely difficult to say, that the freight of a future voyage might not become the subject of an equitable agreement, as well as a first intended non-existing voyage, if the effect of the assignment were not to separate the freight and earnings forever from the ship itself, but only to separate it for the temporary purpose of securing a debt, and operating only upon that separation of title, till that debt should be paid. Again, in *Curtis v. Auber* (1 Jacob & Walk. 506, 512), where an assignment was made of the present and future earnings of a ship, Lord Eldon supported it, and said ; " In one case I think it was held, that although you might assign the wool then growing on the backs of the sheep, you could not assign the future fleeces.¹ But still it was a good equitable assignment, and rendered the future earnings liable in equity."

The same doctrine was maintained by Mr. Vice Chancellor Shadwell in *Douglas v. Russell* (4 Simons, R. 524) ; and his decree was afterwards affirmed by the Lord Chancellor (1 Mylne & Keen, R. 488), upon appeal, as to an assignment of

¹ See *Grantham v. Hawley* (Hobart's Rep. 132). See 1 Madd. Ch. Pract. 549, 2d. edit.

freight earned and to be earned on an outward and homeward voyage, then about to be undertaken. And it was acted upon and supported in a like assignment of freight to be earned on a particular voyage in the case of *Leslie v. Guthrie* (1 Bing. New Cases, 697, 708, 709), where the whole subject was argued at large, in a suit of the assignees under a bankruptcy.

But the latest case, and certainly one of the most important and satisfactory in its reasoning, as well as its conclusion, is that of *Langton v. Horton* (1 Hare, Rep. 549), before Mr. Vice Chancellor Wigram. There, a deed of assignment by way of mortgage was made of a whale ship and her-tackle and appurtenances, and all oil and head matter and other cargo, which might be caught and brought home in the ship on and from her then present voyage; and the question arose between an execution creditor of the assignor, and the assignee, whether the assignment was good as to the future cargo obtained in the voyage after the assignment. The learned Vice Chancellor decided, that it was. Upon that occasion he said; "Is it true, then, that a subject to be acquired after the date of a contract, cannot, in equity, be claimed by a purchaser for value under that contract? It is impossible to doubt, for some purposes at least, that, by contract, an interest in a thing not in existence at the time of the contract may, in equity, become the property of a purchaser for value. The course to be taken by such purchaser to perfect his title, I do not now advert to; but cases recognising the general proposition are of common occurrence. A tenant, for example, contracts that particular things, which shall be on the property when the term of his occupation expires, shall be the property of the lessor at a certain price, or at a price to be determined in a certain manner. This, in fact, is a contract to sell property not then belonging to the vendor, and a Court of Equity will enforce such contracts, where they are founded on

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valuable consideration, and justice requires, that the contract should be specifically performed. The same doctrine is applied in important cases of contracts relating to mines, where the lessee has agreed to leave engines and machinery not annexed to the freehold which shall be on the property at the expiration of the lease, to be paid for at a valuation. The contract applies, in terms, to implements, which shall be there at the time specified ; and here neither construction nor decision has confined it to those articles, which were on the property at the time the lease was granted. But it is not necessary, that I should refer to such cases as these ; for Lord Eldon, in the case of the ship *Warre* (8 Price, 269, n.), and in *Curtis v. Auber* (1 J. & W. 526), has decided all, that is necessary to dispose of the present argument. Admitting that those cases are not specifically, and in terms, like the principal case, they are not of the less authority for the present purpose ; for they remove the difficulty, which has been raised in argument, and decide that non-existing property may be the subject of valid assignment. I will suppose the case of the owner of a ship, which is going out in ballast, proposing to borrow of another party a sum of 5000*l.* to pay the crew and furnish an outfit ; and agreeing that, in consideration of the loan, the homeward cargo should be consigned to the party advancing the money. It cannot reasonably be denied, in the face of the authorities I have just referred to, that a Court of Equity, upon a contract so framed, would hold, that the party advancing the money was, as against the owner, entitled to claim the homeward cargo. And if a party may contract for the consignment of a homeward cargo, I cannot see, why he may not contract with the owner of a ship engaged in the South Sea fisheries, that the fruit of the voyage, the whales taken, or the oil obtained, shall be his security for the amount of his advances. I cannot, without going in opposition to many authorities, which have been cited, throw any

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doubt upon the point, that Birnie, the contracting party, would be bound by the assignment to the plaintiffs."

Now, it seems to me, that this reasoning is exceedingly cogent and striking; and it stands upon grounds entirely satisfactory and conclusive upon the whole subject. What, then, is there to distinguish the case before the Court from this reasoning? I confess myself unable to perceive any. It seems to me a clear result of all the authorities, that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily, or with notice, or in bankruptcy.¹

But, then, it is argued, that here the possession of the property was during the whole period of four years to remain in the mortgagors, and they were to take the rents and profits thereof for their own benefit. Nay; that they had the power to dispose of the stock in trade and the other property by sale, and thus they acquired and retained the full dominion over the same during that period; which is inconsistent with the nature and objects of such a mortgage, and against the policy of the law. In short, that as to creditors, it operates a virtual constructive fraud upon their rights. As to the possession and use of the property, and taking the rents and profits thereof, there is nothing in that part of the objection, which will invalidate the mortgage. Nothing is more common in

¹ See 2 Story on Eq. Jurisp. § 1231, and the authorities there cited; Cross on Liens, ch. 12, p. 187, 188, 191, 192; *Prebble v. Boghurst* (1 Swanst. R. 309); *Needham v. Smith* (4 Russ. R. 318); *Randall v. Willis* (5 Ves. R. 262, 274, 275); *Simond v. Hibbert* (1 Russ. & Mylne, R. 719).

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mortgages of real estate than an agreement, that the mortgagor shall take the rents and profits until breach of the condition thereof. And as to chattels, there is as little question, that, where a mortgage or a lien is created on chattels by contract, it is entirely competent for the parties to agree, that the possession and use thereof shall be retained by the mortgagor until the breach of the condition, or by the debtor until the creditor shall assert his rights against it as a security for the debt. Even in cases of bankruptcy, a qualified possession of the property by the debtor will not oust the creditor of his rights, as leaving the property in the order and disposition of the debtor under the statute of 21 Jac. 1, ch. 19, § 10, § 11, or the statute of 6 Geo. 4, ch. 16, § 72. That was expressly held in *Crowfoot v. London Dock Company* (2 Crompt. and Mees. 637), where the possession of the debtor was not exclusive, but was mixed up with that of the creditor, the property (steam engines and other apparatus), being employed by the debtor in operations, conducted by the company, the possession of the debtor being in pursuance of an arrangement, under which he had a right of user for the purposes of the contract. The case of *Hawthorn v. Newcastle and North Shields Railway Company*, reported in Cross on Lien, Appendix 408, carried the doctrine a step farther; and decided, that a covenant in a contract to build a bridge for the company, made by the builders, that the company should have a lien upon the machines, implements, and materials of the builders, in or upon the land or grounds, where the bridge was to be built, as a security for the completion of the works, was good in favor of the company, in the case of the bankruptcy of the builders, as a lien, in the nature of a shifting lien, upon such materials, as happened for the time being to lie upon the actual line of the railway, or upon the adjacent land in possession of the company. Under the statute of Maine for the recording of mortgages of personal property (Act of 1839, ch. 390), where

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the mortgage is recorded, it is valid, without possession of the property mortgaged being delivered to the mortgagee ; and a stipulation, that it shall remain in possession of the mortgagor until breach of the condition, has been upheld as within the true spirit and intendment of the act.¹

Then, as to the supposed right of sale, of the stock in trade and other mortgaged property. Admitting it to exist, and to be fairly deducible from the language of the instrument (which certainly is not a strained construction of its apparent object and intent), that right, conceded by the mortgagee, is not inconsistent with the validity of the mortgage ; for still the proceeds, or other equivalent property may be substituted for it, and if the parties consent to such an arrangement, there seems no legal objection to it. The case of *Abbott v. Goodwin* (20 Maine Rep. 408 ; 2 Appl. & Shep. 408), manifestly proceeds upon this ground. In that case, it was expressly decided, that if the mortgagor should, under a stipulation in the mortgage, giving him that authority, sell the goods mortgaged, and with the proceeds should purchase other goods, the latter goods would represent the first, and be substituted for them ; and would be, equally with the first, subject to the lien of the mortgagee. Now, in effect, precisely what the Court thus decided to be the result of law, is provided for by the agreement of the parties in the present mortgage. *Macomber v. Parker* (14 Pick. R. 497), affirms the same doctrine ; and both proceed upon principles analogous to those held in *Hawthorn v. Newcastle and North Shields Railway Company*, already cited.

This objection, then, falls to the ground, and leaves the case stripped of every other consideration, except the argument, that the mortgage is a virtual fraud upon the other creditors, and is against the policy of the law, and, therefore, cannot be

¹ *Forbes v. Parker* (16 Pick. R. 462) ; Revised Statutes of Maine, ch. 125, § 32, p. 558, edit. 1841. *Abbott v. Goodwin* (2 Appl. & Shep. R. 408).

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protected against the claims of the other creditors, however it might stand valid as between the parties themselves. And this, in effect, is the remaining point arising upon the second question propounded at the hearing. Now, if the considerations already suggested are sound, they seem to dispose of this part of the controversy. There is no pretence of any fraud, either actual or constructive, intended by the mortgagor and mortgagee. So far as their intentions are concerned, they were upright, and honest, and correct. The mortgage was recorded, and there is no ground to suggest any intentional concealment. The possession of the property by the mortgagors, and the power to use it and dispose of it, was not only consistent with the deed, but was positively avowed and provided for by it. The creditors, therefore, were not allured by any false colors or false credit held out to mislead them. Now, I am not aware of any policy of the law, or of any principle of law, which makes any conveyance of this sort invalid as to creditors, if they have full notice, or may have full notice of it by the exercise of reasonable diligence. Indeed, the law makes the registration of the deed constructive notice of its contents to all persons ; since it was required to be registered, and was registered in conformity to law. What ground is there, then, to assert, that the conveyance was against the policy of the law ? The phrase itself is somewhat indefinite, and in its actual application here, is difficult to be grasped and comprehended. I profess, that I am not able to perceive any ; and, as far as authorities go, they point the other way. Besides ; the assignees here stand before the Court affected with all the equities of the original debtors ; and the creditors here assert their rights through and under the assignee and not by any paramount title.

In every view, therefore, which I am able to take of the case, it seems to me, that the claim of the assignee is not maintainable, and that his petition ought to be dismissed.

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Under all the circumstances, as the questions are of a somewhat novel character, I incline to think, that the respondents ought not to be allowed their costs; and that the costs of the assignee should be a charge on the bankrupts' estate. But this is a matter for the consideration of the District Judge.

I shall, accordingly, direct a certificate to be sent to the District Court, answering both the questions adjourned into this Court in the affirmative.

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NATHANIEL MITCHELL, ASSIGNEE OF PAINE & MESERVE,

v.

GREAT WORKS MILLING AND MANUFACTURING COMPANY.

CERTAIN persons associated themselves together, under the name of the "Wilson Mill Privilege," and appointed A. and B. as their agents and attorneys, who took charge of their property, and erected buildings, and made improvements, and advanced money; afterwards, they obtained a charter and incorporation as "The Great Works Milling and Manufacturing Company," and voted to settle all the accounts of the agents, and ratified their proceedings, and continued A. as their agent; but no settlement of the agents' accounts was ever made; and the present bill being brought by their assignee, *It was held*, that it was a proper case for the interposition of a Court of Equity.

In matters of account Courts of Equity possess a concurrent jurisdiction with Courts of law, in most, if not in all cases, and where the case is one, wherein a Court of law could not afford an adequate redress, it is proper for the interposition of a Court of Equity.

Under the Bankrupt Act of 1841, ch. 9, the Circuit and District Courts have full jurisdiction in Equity, in respect to all cases arising in bankruptcy, to do all which is necessary and proper to accomplish the entire settlement and distribution of the bankrupt's estate, whether the proceedings be formal or summary.

Congress have a complete constitutional authority to enact a Bankrupt Act, giving to the District and Circuit Courts full jurisdiction in law and Equity.

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Congress has no right to require, that the State Courts shall entertain suits for the objects and purposes to be carried into effect by the Bankrupt Act.

BILL in Equity: The bill was brought by Nathaniel Mitchell, of Portland, assignee in bankruptcy of Seth Paine, jr., and John L. Meserve, both of said Portland, formerly partners under the name and firm of Paine & Meserve, against the "Great Works Milling and Manufacturing Company." It sets forth, that Enoch Paine, Josiah S. Little, Seth Paine, junior, and John L. Meserve, all of Portland, and State of Maine, and Joseph B. Hervey, of Newburyport, Massachusetts, having, before the time hereinafter mentioned, formed themselves into a voluntary association, and being then and there the owners of certain real estate in the county of Penobscot, known as the Wilson Mill Privileges, did, on the twenty-second day of June, 1835, by an agreement in writing between themselves, duly signed and sealed, appoint Seth Paine, junior, and John L. Meserve aforesaid, to be their agents and attorneys, to act on the matters aforesaid, on behalf of all of said parties, a copy of which said agreement is annexed, and made part of the bill. That on the twenty-seventh of July, 1835, Joseph W. Hale, Francis B. Todd, and Nathaniel F. Deering, all of Portland, became the purchasers of one undivided twelfth part each of the aforesaid property, and that Edmund L. D. Breton, at Bangor, on the seventh of August, 1835, also became the purchaser of one undivided twelfth part of the said property, and that the said Hale, Todd, Deering, and Breton, by a writing to that effect, under their hands on the back of said agreement, consented and agreed to be bound by the said agreement in the same manner as if they had been originally parties thereunto; and the said Paine and Meserve having been duly appointed, as above set forth, the agents and attorneys for the Wilson Mill Privilege Association, took upon themselves that trust, and continued

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in that capacity until the dissolution of said association, and that they went on to the property, and caused extensive improvements to be made, and buildings to be erected thereon, in pursuance of the instructions, and in carrying out the intentions, of the members of said association ; during the progress of which improvements, the said Paine and Meserve were at great personal expense, and laid out and advanced large sums of money, for the benefit of said association ; in consequence whereof the said association became greatly indebted to the said Paine and Meserve. And that the said association ratified and confirmed the said actings and doings of said Paine and Meserve. That they petitioned the Legislature of the State of Maine for an act of incorporation, which was granted in 1831, incorporating Enoch Paine, Nathaniel F. Deering, E. M. Wildredge, John L. Meserve, Joseph W. Hale, Joseph B. Hervey, Josiah S. Little, Francis B. Todd, and their associates, being the associates aforesaid, owners of said Wilson Mill Privileges, by the name of the Great Works Milling and Manufacturing Company, and that the said Paine and others, the associates aforesaid, accepted the charter of incorporation, and transferred and conveyed all their interest in the property of the association to the Great Works Milling and Manufacturing Company, which last mentioned company accepted the transfer, and in consideration thereof, they undertook and promised to pay, meet, or adjust, all the debts and liabilities of said voluntary association ; and that afterwards, at an adjourned meeting of the stockholders of the Great Works Milling and Manufacturing Company, held on the twenty-third day of May then next, it was voted, that the directors be authorised to settle all the accounts of the agents and attorney of the proprietors, and that the doings and contracts of the attorney of the proprietors be hereby ratified and confirmed, the said proprietors being said associates, and the proprietors of the Wilson Mill Privileges, and designated in

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said vote as proprietors, in contradistinction to the stockholders, as such, in the said corporation; that, at a directors' meeting of the directors of the said corporation, held the twenty-fourth day of May, 1836, it was "voted, that Mr. Seth Paine, jr. be requested to proceed to the establishment of the company, and, in behalf of the directors, to assume the agency and direction of the business of the company, and report his doings to the directors." And that, in pursuance of this vote and authority, the said Paine continued to act in the capacity of agent for said company, and, in the discharge of the duties of said office, laid out, and advanced, and expended large sums of money for the benefit of the said corporation; in consequence whereof the said corporation became greatly indebted to the said Paine. That in the month of September, 1837, there was an attempt made to settle the account between Seth Paine, jr. and the Great Works Milling and Manufacturing Company, and, at the same time, Paine and Meserve presented their account against the Great Works Milling and Manufacturing Company, which account was not disputed; but a certain amount due from the said Paine and Meserve was allowed towards payment of it. And that, afterwards, another attempt was made at settlement; but the parties did not make any adjustment at that time, nor have the said Paine and Meserve, nor the said Paine, been able to obtain a settlement to this time; although the said Paine and Meserve have been ready, and frequently solicited an adjustment; but that the corporation have delayed and refused, from time to time, to make any such settlement, and still refuses so to do. And, although the said Seth Paine, jr. was constituted the agent of the said corporation, yet the said Paine being, in fact, in company with the said Meserve, and acting, as well for said Meserve as for himself, the said Paine, in all his acts, making advances, and superintending, and directing the business of said company, agreeably to said vote of May 24th, 1836,

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acted as a member of and for the joint interest of said firm. And that all sums of money, due on account of such agency, and such disbursements and expenditures of said Paine, is, in fact, in Equity and good conscience, due to said Paine and Meserve. And that there is, in fact, due to said Paine and Meserve, on a fair and equitable adjustment of accounts, from said corporation a large sum of money, to wit, 2310 dollars, with interest thereon.

All which actings and doings of the said Great Works Milling and Manufacturing Company, in their own behalf, and on behalf of the Wilson Mill Privileges Association, are contrary to Equity and good conscience, and tend to the manifest wrong and injury of the plaintiffs in the premises. In consideration whereof, and for as much as the plaintiff is remediless in the premises in and by the strict rules of the common law, and cannot have adequate relief save in a Court of Equity, where matters of this and the like nature are properly cognizable and relievable, the plaintiff prays for a writ of subpoena in due form of law, directed to the Great Works Milling and Manufacturing Company and to the proper officers of said corporation, or in such other manner as this honorable Court shall direct, thereby commanding the said corporation, by its proper officers, or in such manner as this Court shall direct, to appear before your Honors at a certain day, then and there to answer the premises, and to stand and abide such order and decree therein as shall be agreeable to Equity, and good conscience.

To this bill a demurrer was filed. And the cause was argued upon the demurrer by *W. Pitt Fessenden*, for the company, and by *Wm. P. Preble*, for the plaintiff. The arguments will sufficiently appear in the opinion of the Court, and are not therefore here repeated.

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STORY, J. — Two objections have been taken, on the part of the defendants, (1). That the matter of the bill, although for an account, is completely remediable at law, and, therefore, not the fit subject matter of a bill in Equity. (2). That the Circuit Court has not jurisdiction in this case in bankruptcy under the Bankrupt Act of 1841, ch. 9. In the judgment of this Court, neither objection is maintainable; and I will shortly proceed to state the reasons of this determination. As to the first objection, it is certainly true, that, in matters of account, Courts of Equity possess a concurrent jurisdiction, in most if not in all cases, with Courts of law. In the present case, taking the statements of the bill to be true, which we must upon the demurrer, it seems to us not only clear, that it is a case fit for the interposition of a Court of Equity, but that it is emphatically so, as one where a Court of law could not render any justice in the matter; or, if any, it must be a very crippled and imperfect redress. It is, indeed, impossible to read the bill and not to feel, that some of the claims there set up, considering the complications and changes of interests of the parties, cannot be adequately examined or properly disposed of except in a Court of Equity.

But the more material consideration is that, which respects the jurisdiction of this Court to maintain the bill under the Bankrupt Act of 1841, ch. 9, as it is a case, which would not otherwise fall within its general jurisdiction. At the threshold of the argument, we are met with the suggestion, that when the act was before Congress, the opposite doctrine was then maintained in the House of Representatives, and it was confidently stated, that no such jurisdiction was conferred by the act, as is now insisted on. What passes in Congress upon the discussion of a bill can hardly become a matter of strict judicial inquiry; and if it were, it could scarcely be affirmed, that the opinions of a few members, expressed either way, are to be considered as the judgment of the whole House, or

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even of a majority. But, in truth, little reliance can or ought to be placed upon such sources of interpretation of a statute. The questions can be, and rarely are, there debated upon strictly legal grounds, with a full mastery of the subject and of the just rules of interpretation. The arguments are generally of a mixed character, addressed by way of objection, or of support, rather with a view to carry or defeat a bill, than with the strictness of a judicial decision. But if the House entertained one construction of the language of the bill, *non constat*, that the same opinion was entertained either by the Senate or by the President; and their opinions are certainly, in a matter of the sanction of laws, entitled to as great weight as the other branch. But in truth, Courts of justice are not at liberty to look at considerations of this sort. We are bound to interpret the act as we find it, and to make such an interpretation as its language and its apparent objects require. We must take it to be true, that the Legislature intend precisely what they say, and to the extent, which the provisions of the act require for the purpose of securing their just operation and effect. Any other course would deliver over the Court to interminable doubts and difficulties; and we should be compelled to guess what was the law, from the loose commentaries of different debates, instead of the precise enactments of the Statute. Nor have there been wanting illustrious instances of great minds, which, after they had, as legislators, or commentators, reposed upon a short and hasty opinion, have deliberately withdrawn from their first impressions, when they came upon the judgment seat to re-examine the statute or law in its full bearings.

Passing from these considerations, which have been drawn from us by the suggestions at the bar, let us look at the actual provisions of the Bankrupt Act of 1841, ch. 9. And here, in order to ascertain the jurisdiction of the Circuit Court, we must first examine what is the jurisdiction given to the Dis-

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trict Court. The 6th section of the act declares, "That the District Court in every District shall have jurisdiction in all matters and proceedings in bankruptcy, arising under this act, and any other act, which may hereafter be passed on the subject of bankruptcy; the said jurisdiction to be exercised summarily, in the nature of summary proceedings in Equity." And then, not by way of restriction, but of explanation, if not of enlargement of the objects of this jurisdiction, it proceeds to declare: "And the jurisdiction hereby conferred on the District Court shall extend to all cases and controversies in bankruptcy, arising between the bankrupt and any creditor or creditors, who shall claim any debt or demand under the bankruptcy; to all such creditor and creditors, and the assignee of the estate, whether in office or removed; to all cases and controversies between such assignee and the bankrupt; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." Now, it seems to us, impossible to doubt, that the object of these clauses, which are sufficiently broad and comprehensive for the purpose of giving the District Court complete jurisdiction to accomplish, of itself, all the purposes of the Act, and to enable it, independently of any other jurisdiction, to begin, continue, and end, all such proceedings as might be necessary and proper, in an equitable view, to accomplish the entire settlement and final distribution of the bankrupt's estate. To us it seems perfectly clear, that Congress possess a complete constitutional authority to enact such a law for such an object; for the judicial power, by the constitution, extends "to all cases in law and equity, arising under this constitution and the laws and treaties made, or which shall be made under their authority;" and further, Congress are authorised by the constitution, "to pass uniform laws on the subject of bankruptcies throughout the United States."

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The judicial power has, in this respect, under the constitution, always been construed to be co-extensive with the legislative powers, upon the plain ground, that the constitution meant to provide ample means to accomplish its own ends by its own Courts. Now, looking to the many objects and purposes of the Bankrupt Act of 1841, ch. 9, it would seem strange, that Congress should not have provided all the necessary and proper means to accomplish all its purposes. It is clear, that Congress has no right to require, that the State Courts shall entertain suits for such objects and purposes. The States, in providing their own judicial tribunals, have a right to limit, control, and restrict their judicial functions, and jurisdiction, according to their own mere pleasure. They may refuse to allow suits to be brought there "arising under the laws of the United States" for many just reasons; first, that Congress are bound to provide such tribunals for themselves; secondly, that State Courts are not subject to the legislation of Congress as to their jurisdiction; thirdly, that it may most materially interfere with the convenience of their own Courts, and the rights of their own citizens, and be attended with great expense to the State, as well as great delays in the administration of justice, to allow their Courts to be crowded with suits, arising under the laws of the United States; and fourthly, as in the present case, that it would involve the State Courts in almost endless examinations and discussions of the principles and bearings of the bankrupt law, confessedly a system novel in our jurisprudence, intricate in its details, and involving questions exceedingly complicated and difficult in its practical operation. Suppose, upon considerations of this sort, any State legislature should prohibit its own Courts from taking cognizance of any causes arising under the bankrupt act, no one could doubt, that it was a perfectly constitutional exercise of authority, and not justly to be complained of, as a want of comity or of justice. A due regard of a State to its own rights,

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and its duties to its own citizens, might require such a course, in order to prevent oppressive delays, and obstructions in the actual administration of home justice ; and, at all events, might justify it in preferring such claims to those, belonging appropriately to the national jurisdiction. Besides all these considerations, there is one, which cannot but be deemed of paramount importance in the administration of a system of bankruptcy. It is uniformity, promptitude, regularity, and efficiency in carrying into effect all its provisions. The Courts, which are to administer such a system, must possess not only jurisdiction at law, but in Equity ; not only a right to proceed in a formal way, but to act summarily ; not only to hold regular terms, but to be always open ; not only to be bound to act, but to be governed by uniform rules and principles of interpretation and action, at least, as far, as from the diversity of human judgments, such uniformity of rules, principles, and proceedings, can be looked for in practice. But what can be expected from a hundred of State Courts, organized upon no uniform system, governed by no uniform jurisprudence, and in their jurisdiction and modes of proceeding, admitting of almost endless diversities of practice and action ? So far from any system of bankruptcy being capable of any uniformity of action throughout the United States, under such circumstances, it would be in no two States, perhaps in no two tribunals of the same State, the same. And if every decision in a State tribunal was to be subject to the appellate jurisdiction of the Supreme Court of the United States, instead of the proceedings in bankruptcy being completed, as the Act of 1841, ch. 9, § 10, manifestly contemplates, within two years from their commencement, a half century might elapse before such a consummation.

Now, it is precisely because considerations of this sort could not be supposed to escape the notice of Congress, but must have pervaded the whole purposes of legislation on the sub-

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ject of bankruptcy, that we should be utterly surprised, if adequate provisions were not made in the Act of 1841, ch. 9, to carry the entire system into effect, through the instrumentality of the Courts of the United States, over which Congress possess a complete authority, subject to no foreign control, or government, or obstruction. It was not necessary to say, that the Courts of the United States should possess exclusive jurisdiction. It was only necessary to say, that they should possess full jurisdiction, and to leave to the State Courts the exercise of any concurrent jurisdiction, which they could or might rightfully maintain. In this way, it would naturally follow, that after a little experience in the workings of the system, with the aid of some amendments by Congress, the Courts of the United States would soon attain punctuality, uniformity, and promptitude, in administering the system, so as to accomplish in the fullest manner all the ends of private, as well as of public justice.

Now, as it seems to us, this very object was designed to be attained, and can be attained by the provisions of the 6th section of act of 1841, ch. 9, already cited, if we give to the words their natural, and appropriate meaning, and infuse into them no subtleties, or doubts, or refinements, grounded upon the supposed intentions of Congress, or upon technical doctrines, or upon particular local policy. If ever there can be a case for the application of a liberal interpretation of an act from its apparent objects, as well as from the argument *ab inconvenienti*, it seems to us, that this is the very case, which will most forcibly illustrate its propriety and cogency. Let us look for a moment at some of the provisions of the act to see, what the Courts, sitting in bankruptcy, are required to do. We have already seen, by the 10th section of the act of 1841, that it is required, "That all the proceedings in bankruptcy in each case shall, if practicable, be finally adjusted, settled and brought to a close by the Court within two years

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after the decree declaring the bankruptcy." How is this to be done, unless the Court possesses jurisdiction, co-extensive with all the subject matters in bankruptcy, to enforce and adjust all claims? How can this be enforced, if the entire jurisdiction to collect debts, and to settle controversies in bankruptcy, belongs exclusively to the State Courts? What control can the Courts of the United States, sitting in bankruptcy, exercise over the State Courts to regulate, or to speed their proceedings? Besides; The same section of the act declares, "That, in order to insure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the Court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof, at as early periods as practicable, consistently with a due regard to the interests of the creditors." Now, here the end is required of the Court; and can it reasonably be doubted, that the means are also given to the Court to accomplish it? Construe the clause in the 6th section of the act of 1841, where it extends the jurisdiction of the District Courts "to all acts, matters, and things to be done under, and in virtue of the bankruptcy, until the final distribution, and the settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy," to include the jurisdiction to entertain suits to adjust all adverse claims, and to collect all outstanding debts (as its terms are sufficiently comprehensive to include), and we have exactly such a jurisdiction, commensurate to the end. Construe it otherwise, and the Court sitting in bankruptcy is left crippled and maimed; and we require it to move onward, when it is chained to the earth.

These are some of the grounds, which satisfy our minds, that Congress did not intend to leave the bankrupt system, for its practical operation, or success, or efficiency, to the good pleasure, or discretion of the States, or to their voluntary and gratuitous efforts to enforce or sustain it. Congress meant to

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provide a system capable of entire self execution by the national tribunals, without the assistance or co-operation of the States, if the parties interested should choose to rely upon the national arm. The jurisdiction given to the District Courts is, as we construe it, ample for all such purposes ; and we see no reason, why the general language, in which it is given, should be restricted, so as to defeat a single purpose of the act.

Such then being in our judgment the jurisdiction given by the Act of 1841, ch. 9, to the District Courts, we are next led to the consideration of the jurisdiction of the Circuit Court ; and if, as we think, the District Court would have complete jurisdiction of the present case, we think, that there can be no doubt, that this Court also possesses it under the 8th section of the Bankrupt Act of 1841, ch. 9. That section declares, " That the Circuit Court within and for the district, where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the District Court of the same district of all suits at law and in Equity, which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to or vested in such assignee." Now, there cannot be a doubt, that a debt claimed by and due to the bankrupt from any person is " a right of property " in the bankrupt. Every chose in action is a right of property, assignable in Equity, if not at law ;¹ and it is clearly assignable under the bankrupt act ; for that act declares (§ 3), that upon the decree in bankruptcy, " All the property and rights of property, of every name and nature, real, personal, or mixed, of every bankrupt, &c. shall be deemed vested by force of the same decree in the assignee," &c. ; and the assignee is by the same

¹ See *Gray v. Bennett* (3 Metc. R. 522, 531).

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section vested with full power and authority to sue for the same, as fully, to all intents and purposes, as the bankrupt himself might at the time of his bankruptcy. The debtor in every such case is necessarily in the sense of the act an adverse party ; if he were not, he would pay the debt or claim ; and his very resistance of it, upon suit brought, shows him to be, in form as well as in fact, an adverse party. So that, upon the plain terms and import of the section, the jurisdiction of the Circuit Court would become unquestionable in the present case. And, indeed, as it is a concurrent jurisdiction with the District Court (designed doubtless to aid that Court in cases of grave doubt and difficulty), it also shows, that this very class of cases was deemed to be within the jurisdiction of the District Court, by and in virtue of the 6th section of the act already referred to. Each section reflects a strong light upon the other, and establishes the intention of Congress to be, that its own Courts should possess a plenary jurisdiction over all cases and controversies, connected with and growing out of any bankruptcy.¹

Upon the whole, our opinion is, that the demurrer should be overruled.

OLIVER M. WHIPPLE

v.

THE CUMBERLAND MANUFACTURING COMPANY.

WHERE A. brought an action against B. for flowing back the water of the river Presumpscot, to the injury of his rights, as Riparian proprietor, and to the obstruction of his mills ; *It was held*, that if the plaintiff could prove, that the natural flow of the stream was changed by any person, not having a legal right to change it, he could recover nominal damages, although no actual injury had been thereby occasioned to him.

¹ See S. P. *Ex parte City Bank of New Orleans* (3 Howard Sup. Ct. R. and 7 Law Reporter, 553).

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Wherever a wrong is done to a right, the law imports damage; and if no substantial injury be proved to be thereby occasioned, nominal damages will be given in support of the right.

In such cases, if the plaintiff establish his right of action, the jury may, if they choose, give him such damages as will fully indemnify him beyond what the taxed costs would reach, and may take into consideration counsel fees, and other necessary expenses, fairly incurred by him in the case. A verdict will not be set aside, in a case of *tort*, for excessive damages, unless it clearly appear, that the jury committed some gross and palpable error, or acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated.

ACTION on the case for flowing back the water of the river Presumpscot, in the town of Gorham, Maine, to the injury of the rights of the plaintiff, as a riparian proprietor, and also to the injury and obstruction of the plaintiff's mills, situated at or near Gambo Falls, on the same river. The declaration contained various counts, alleging the *gravamen* in various ways, in some of which the injury was asserted to be by flowing back the water, so as to obstruct the plaintiff's mills in their due operation, and in others, an injury also to the lands of the plaintiff, as a riparian proprietor on the same river. The cause was tried at the adjournment of the May Term, 1842, upon the general issue; and a verdict was found for the plaintiff for \$1400.

At the trial it was admitted, on the part of the defendants, that the plaintiff was the owner of the mills, and mill privilege, and lands on the river Presumpscot, described in his declaration, to which the injury was alleged to be done. It was also admitted, on the part of the plaintiff, that the defendants were the owners of the Knight Dam, so called, and the mill privilege erected thereon, which was situate lower down on the same stream than the plaintiff's mills and lands; and that the defendants, as such owners, were entitled to flow back the water of the river as far and as high as it had been flowed back by the Knight Dam, which had been erected about

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1786 or 1787, they having succeeded to all the rights of the proprietors of the Knight Dam, and the privileges thereof. The main controversy at the trial turned upon this, whether the water was flowed back further than it was by the old Knight Dam, which was affirmed by the plaintiff, and denied by the defendants; and also whether it flowed back so as to obstruct the plaintiff's mills and mill privilege, which was affirmed by the plaintiff, and denied by the defendants. A great deal of evidence was introduced to these points on both sides, and was submitted to the jury.

STORY, J., in summing up to the jury, after stating the various facts offered in evidence by the parties, said; The real question between the parties is, whether the water is now flowed back by the defendants upon the plaintiff's lands and mills, or upon either of them, higher and further than the Knight Dam had formerly flowed it back. One means of ascertaining this is to ascertain, whether the new dam, now erected on the Knight Dam, is higher than the old dam; for if it is, that will, of itself, afford a strong inference, that the water is flowed back higher and further; for water will obey the ordinary operations of the law of nature. Streams do not flow backwards in the ordinary course of things, unless there be some obstruction below to interfere with their usual passage. Another means doubtless is to ascertain, whether, in point of fact, the water does now ordinarily flow backwards higher and further than formerly. Thus, for example, if it now ordinarily does drown or cover lands, or rocks, or banks in the stream, which were not formerly so drowned or covered in the ordinary course of the river; or if the mills of the plaintiff are now subjected to stoppage and obstruction from back water in the ordinary state of the river, which did not formerly take place, that also would furnish grounds, from which the jury might infer, that the present dam was higher than the old

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Knight Dam. But flowage back, occasioned by extraordinary freshets, or by other distinct causes, in no wise connected with any supposed increased height of the Knight Dam, ought not to be allowed to have any influence upon the minds of the Jury against the defendants in the present cause.

In respect to the right of the plaintiff to maintain the present suit, it is not indispensable for him to show, that the water is flowed back by the defendants, so as actually to obstruct and stop the operation of his mills. There is evidence for the Jury to consider on this point; and if they are of opinion, that such a stoppage and obstruction did exist, by the act of the defendants, they ought to give damages therefor to the plaintiff. On the other hand, if the defendants flowed back the water by increasing the height of the Knight Dam beyond that of the old Knight Dam, so as to drown or cover a portion of the plaintiff's land, that also would be a ground for giving him damages therefor. Indeed, the principle of law goes much further; for every riparian proprietor is entitled to have the stream flow in its natural channel, as it has been accustomed to flow, without any obstruction by any mill or riparian proprietor below on the same stream, unless the latter has acquired such a right by long user, or by purchase, or in some other mode, which the law recognises as conferring a title on him.¹ And if any mill or riparian proprietor below on the same stream does, without any such title, undertake to obstruct or change the natural stream, then, although the riparian proprietor above cannot establish in proof, that he has suffered any substantial damage thereby, still he is entitled to recover nominal damages, as it is an invasion of his rights, and would, if acquiesced in, make the *tort* thus done to

¹ See *Tyler v. Wilkinson* (4 Mason R. 497); *Mason v. Hill* (5 Barn. & Ald. R. 1); *Williamson v. Morland* (2 Barn. & Cresw. 910); *Wright v. Howard* (1 Sim. & Stu. 190); *Blanchard v. Baker* (8 Greenl. 253, 266); 3 Kent Com. Lect. 52, p. 439.

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him ripen by long user into a right against the party. In short, wherever a wrong is done to a right, the law imports, that there is some damage to the right, and, in the absence of any other proof of substantial damage, nominal damages will be given in support of the right. This is a well-known and well-settled doctrine in the law, and has been fully recognised in this Court.¹

In respect to damages, in cases of this sort, where the plaintiff comes to vindicate his right against an injury by wrong-doers, if he establishes his right of action, the jury have a right, if they choose, to give him such damages as will fully indemnify him, beyond what the costs taxed in the cause will reach. In considering what is the proper amount or measure of damages, they are at liberty to take into consideration the necessary expenses of fees to counsel, and other necessary expenses, to which the plaintiff has been put in the progress of the cause, and by the nature of the defence, beyond what he will be indemnified for by the taxable costs. It might otherwise happen, that a plaintiff might be grievously injured, or suffer great pecuniary losses, by his endeavors to vindicate his right against mere wrong-doers. The Jury are not, indeed, bound, under such circumstances, positively to include such necessary expenses in the damages. What the Court mean to say is, that they are at liberty, if they choose, to include such reasonable compensation in the damages, for such necessary expenses, as they may think were properly and fairly incurred in the vindication of the right of the plaintiff. And with these remarks he left the case to the jury, who found a verdict for the plaintiff, as has been already stated, for \$1400.

Rand and *Preble*, for the defendants, afterwards filed a motion for a new trial, which was as follows :

¹ *Webb v. The Portland Manufacturing Company* (3 Sumner R. 189); *Butman v. Hussey* (3 Fairf. R. 407).

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“ And now, after verdict, and before judgment, the defendants move the Court, that the verdict of the jury returned in this case, may be set aside, and a new trial granted ; because, the Court instructed the jury, that the question to be considered and decided by them was, whether the dam, erected by the defendants and now standing upon their premises, is or is not higher than the Knight dam : whereas, the jury should have been instructed, that the question to be considered and decided by them was, whether the dam, erected by the defendants and now standing upon their premises, does or does not cause the water to flow back upon the plaintiff’s mills and mill wheels, more than the Knight dam did.

“ And also, because, the Court instructed the jury, that in estimating the damages to which the plaintiff would be entitled (if any), they should allow the plaintiff, in addition to the actual damages sustained by the flowage of his mill wheels and mills, such further sum as would be sufficient to indemnify him for all expenses incurred by said plaintiff in the prosecution of this suit, including all counsel fees : whereas, the jury should have been instructed, that the plaintiff (if entitled to recover at all), could recover only the damages actually sustained by him in consequence of the flowage of water upon his mill wheels, there being no evidence or pretence, that such flowing was done vexatiously, or maliciously, but only under a belief, that they were in the lawful exercise of their own right.

“ And also, because, the damages given by the verdict of the jury in this case, are unreasonable and excessive, no actual damage having been proved to have been sustained by the plaintiff, or any evidence introduced tending to prove any actual damage so sustained ; and there being no evidence or pretence, that such flowing was done vexatiously or maliciously, but only under a belief, that they were in the lawful exercise of their own rights.”

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The motion coming on for argument at this term, *Fessenden and Deblois*, for the plaintiff, resisted the motion. They insisted, that the charge of the Court upon the first and second points was not correctly stated. As to the first point, they said: The Court did not say *THE only question* to be settled and decided by the jury was, "whether the *dam* erected by the defendants is or is not higher than the *Knight dam*," but it called the attention of the jury to the fact, that the defendants claimed to flow back the water of the river, as far as the *Knight dam* had formerly flowed it back; and that this fact had been admitted by the plaintiffs, and that, as one means of ascertaining, whether the defendants had flowed back further than they had a right, by virtue of the use of it for twenty years, that they would be called on to *consider and decide*, whether the dam erected by the defendants is or is not higher than the *Knight dam*.

There is a *diminution*, if we may so style it, of the charge of the Judge. He did charge the jury, that they must find that the defendants did cause the water to flow back upon the plaintiff's mills, and mill wheels, and land, more than they had any right to do, and more than the *Knight dam* did.

One mode of ascertaining, whether the property of the plaintiff had been trespassed upon by the defendants, was to find, whether the *new dam* was higher than the *Knight dam*, as, if it were so, the inference was almost a necessary one, that the new dam flowed back more water than the *Knight dam*.

And to this point the defendants introduced much of their testimony, if not the most of it; and it was on this point, that both parties struggled to carry the jury.

It was, therefore, not only proper, but absolutely necessary for the Court to instruct the jury, that they must consider and decide, whether the dam was higher than the *Knight dam*.

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This it did do, but it did more, and instructed the jury in respect to the whole law of the case.

He instructed them, that riparian proprietors had the rights to the flow of the stream passing by and over their lands, as it naturally flowed, and that any one, who obstructed such flow, in any manner, for any length of time, infringed upon the rights of such riparian proprietor, and subjected himself to the action of such proprietor.

And, he further charged the jury, that the rights of the riparian proprietor could be taken away from him only by a user of the water, inconsistent with such rights, for a period of twenty years, in which case the acquiescence of such riparian proprietor in such infringement of his rights abridged them to the extent of such infringement of such rights, and no further. He also instructed the jury, that it was an infringement of such rights to flow back on *the land* of the riparian proprietor, even where the proprietor had not appropriated the water to the use of machinery, and that the flow of the stream was not, in any case, to be disturbed; and he gave to the jury the reason of the law, that twenty years' user of the water gave title to such use, and, therefore, the first infringement must be resisted, or the wrong might be suffered to ripen into a right.

And this, he said, was the universal law of the stream, governing all the riparian proprietors on the stream. And it was only in connexion with these doctrines, that he called the jury to consider, whether the Knight dam was as high as the new one, or rather, whether the new dam was *any higher* than the Knight dam. And the jury could not have mistaken this direction.

With these general directions, therefore, it was for the jury to decide, whether the new dam was higher than the Knight dam, and the direction was correct. He is sustained by the following authorities: 2 Chitty on Pleadings, 600; *Mason v. Hill* (5 Barn. & Ald. 1); *Williams v. Morland* (2 Barn. &

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Cres. 910); *Frankum v. Earl of Falmouth et al.* (6 Carr. & Payne, 529); *Wright v. Howard* (1 Sim. & Stu. 190); *Hazard v. Robinson* (3 Mason, 272); *Tyler v. Wilkinson* (4 Mason, 497); *Webb v. Portland Manufacturing Company* (3 Sumner, 189); *Blanchard v. Baker* (8 Green. 253, 266); 3 Kent Com. Lect. 42, p. 439, 3d ed.

This being the state of the law, we say, that the Judge did right to charge the jury to examine, whether the new dam was higher than the Knight Dam, as one of the modes of ascertaining, whether the defendants flowed back the river more, than by user for twenty years or grant, they had acquired a right to flow back on the land of the plaintiff, as far as they were proved to have flowed it.

As to the second point, they said: The Judge did not charge the jury in the words, or to the import, conveyed in the second cause for a new trial. His charge was in substance and effect this: "That the jury had a right, in considering the damage the plaintiff had sustained, to allow such a sum as will remunerate the plaintiff for the expenses incurred by him in protecting and vindicating his rights, and in pursuing his remedy; that the plaintiff had a right to a perfect indemnity for the wrongs and injury he had sustained, and that the expenses, to which he had been put, were legitimate subjects for the consideration of a jury." But he did not charge the jury, that they might allow the fee of counsel, *eo nomine*. They added, that they were prepared to vindicate the doctrine stated in the second point, even if such had been the charge to the jury.

But the Court said, that the charge had been wholly misconceived, which had been given to the jury, upon the first and second points; and, therefore, upon these points, the case was not arguable. The charge was, in fact, that, which has been already stated.

Rand and *Preble* then said, that they should confine their

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argument to the third and last point, that the damages were excessive and unreasonable.

Fessenden and Deblois argued, That the damages allowed were but a reasonable indemnity for the plaintiff, considering the nature of the suit, the protracted character of the controversy, and the necessary expenses incurred to vindicate it. They cited and relied on *The Boston Manufacturing Company v. Fisk* (2 Mason, R. 119); *Bracegirdle v. Orford* (2 Maule & Selw. 77); *Carter v. American Insurance Company* (3 Peters, R. 307); *Conrad v. Nichols* (4 Peters, R. 309); *Bell v. Cunningham* (3 Peters, R. 84); *Thurston v. Martin* (5 Mason, R. 591); *Coffin v. Coffin* (4 Mass. R. 41); *Leeman v. Allen* (2 Wils. R. 160); *Huckle v. Money* (2 Wils. R. 205, 214); *Sampson v. Smith* (15 Mass. R. 367); *Boies v. M'Allister* (3 Fairf. R. 308).

STORY, J. — We are of opinion, that the motion for the new trial ought to be overruled. The two first points have been already disposed of. The third point is, as to the damages being excessive. We take the general rule, now established, to be, that a verdict will not be set aside in a case of *tort* for excessive damages, unless the Court can clearly see, that the jury have committed some very gross and palpable error, or have acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law, by which the damages are to be regulated. The authorities, cited at the bar, are entirely satisfactory and conclusive on this subject. Indeed, in no case will the Court ask itself, whether, if it had been substituted in the stead of the jury, it would have given precisely the same damages; but the Court will simply consider, whether the verdict is fair and reasonable, and in the exercise of sound discretion, under all the circumstances of the case; and it will be deemed so, unless the verdict is so excessive or outrageous, with reference to those circumstances, as to demon-

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strate, that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice, to mislead them. There is no pretence of any thing of this sort in the present case ; and looking at the nature of the controversy, the number of years, which it has been pending, the unavoidable expenses attending the surveys and employment of agents, as well as the necessary expenses of the employment of counsel beyond what the taxable costs can possibly remunerate, we cannot say, that there is any excess in the damages awarded. They may not be precisely, what we ourselves should have given, sitting on the jury ; but we see no reason to say, that they can, in any sense, be treated as excessive, or unreasonable.¹

Motion overruled, and judgment according to verdict.

¹ See 2 Tidd, Pract. 909, 9th edit. 1828 ; *Pleydell v. The Earl of Dorchester* (7 Term R. 529) ; *Gough v. Farr* (1 Younge & Jerv. 477) ; *Wood v. Hurd* (2 Bing. New Cas. 166).



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ABANDONMENT.

See SHIPPING, 4.

ACCOUNT.

See EQUITY, 19.

ADMIRALTY.

1. The Courts of the United States, in the exercise of their admiralty and maritime jurisdiction, are exclusively governed by the legislation of Congress, or, in the absence thereof, by the general maritime law; and no State can, by its local legislation, narrow or enlarge such jurisdiction.

The Barque Chusan. 456

2. The power given by the Constitution of the United States to Congress, to regulate commerce with foreign nations, and among the several States, includes the power to regulate navigation with foreign nations, and among the States, and is an exclusive power in Congress, which may be exercised with or without positive regulations. *Ibid.*

3. Congress, by conferring the admiralty and maritime jurisdiction upon the Courts of the United States, have, by implication, adopted the maritime law, inasmuch as such law is the law of the admiralty jurisdiction, until modified by Congress.

Ibid.

4. In a lien for supplies or repairs

to a domestic vessel, the Admiralty Jurisdiction depends upon the local law of the particular State where they are made; but questions of lien upon a foreign vessel are governed by the general maritime law, and not by the local law of any State.

Ibid.

5. The doctrine of *DeLovio v. Boit* (2 Gallison's R. 398), respecting the jurisdiction of the District Courts of the United States, as Courts of Admiralty, over policies of insurance, affirmed.

Hale v. Washington Ins. Co. 176.

See SALVAGE, 1, 2.

AMENDMENT.

1. In this case, the original declaration was upon a refusal to deliver up, upon an execution, goods valued at \$7000, and upon leave to amend, granted by the Court, a new count was introduced, claiming them at \$2200; and *It was held*, that although it was within the discretion of the Court to allow the new count, yet, since the line of defence was thereby materially changed, it ought only be granted upon payment of the defendant's costs up to the time, when the offer to file such count was made. *Pierce v. Strickland.* 292.

ANSWER.

See EQUITY, 8, 11.

APPORTIONMENT.

1. The general rule of the common law is, that contracts are not apportionable; and this rule seems ordinarily, though not universally true, where the apportionment is by the act of the party, and not by mere operation of law; or where the contract is only in part performed, and is not in its own nature severable.

Brooks v. Byam. 526

2. *Quære*, if by the maritime law the contract in the case of *Cutter v. Powell* (6 T. R. 320) was not divisible. *Ibid.*

3. No apportionment or division of a license or privilege can be made, if it be contrary to the true intent of the parties thereto. *Ibid.*

4. *Quære*, if an owner grant to A. the privilege of cutting timber off his land, with the assistance of four men employed by him, can A. sell the license and right of employment to the extent of one man's share. *Ibid.*

5. An authority to A. cannot be assigned or executed by B. *A fortiori*, it is not apportionable, so that a part may be executed by B., and a part by C., and a part by D., and the residue by A. *Ibid.*

APPROPRIATION OF PAYMENTS.

1. Where money is paid by, or received for a debtor by his creditor, the debtor may appropriate it to the payment of whatever debt he pleases; if he omit to appropriate it, the creditor may apply it to the satisfaction of whatever demand he pleases; if neither party apply it, and various debts be due, the Court will make appropriation thereof, according to the equity of the case.

2. This right of appropriation exists only between the original parties; and, therefore, *It was held*, in this case, that the assignee of A. could not insist, that money in the hands of B. belonging to A. should be applied in discharge of the mortgage. *Gordon v. Hobart.* 244

See *Equerry*, 7.

ASSIGNEE IN BANKRUPTCY.

See *BANKRUPTCY.*

ASSIGNMENT OF PATENT.

See *PATENT*, 15 to 20, 23, 24.

ASSIGNMENT.

1. To make a grant or assignment valid at law, the thing, which is the subject of it, must have an existence, actual or potential, at the time of such grant or assignment. A mere possibility is not assignable.

Mitchell v. Winslow. 630

2. But Courts of Equity support assignments, not only of choses in action, but of contingent interests and expectations, and also of things, which have no present actual potential existence, but rest in mere possibility only. *Ibid.*

ATTACHMENT.

1. An attachment on *mesne process* does not exactly correspond to a lien, either in the sense of the common law, or of the maritime law, or of Equity. It is only a contingent and conditional charge, until the judgment and levy.

Ex parte Foster. 131

2. A foreign attachment, like an attachment on *mesne process*, is a remedy, and, like every remedy, may be defeated by any act, that bars, or takes away the remedy or right to judgment under it. *Ibid.*

3. Where an under-sheriff attached certain goods without a schedule, and made return thereof as of the value of \$7000, and obtained a receipt therefor with the consent of the plaintiff's attorney, and afterwards, by leave of the State Court, amended his return by reducing the sum to \$2,200, the actual value of the goods; *It was held*, that it was within the discretion of the Court to allow such an amendment, it being a case of pure mistake; and that the decision by the State Court was not revisable by the Circuit Court. *Pierce v. Strickland.* 292

4. *Held*, also, that in cases of special attachment, the plaintiff's

attorney has an implied authority to do all acts, which the interests of his clients may require, and that, in the present case, his assent to the appointment of a receptor was conclusive. *Ibid.*

5. Where an officer, with the creditor's consent, makes a valuation of goods, without taking an inventory, such valuation is to be considered, *prima facie*, as fair and just, and the burthen of proof is on the officer to establish the contrary; but it does not operate as an *estoppel*. *Ibid.*

6. The consent of the creditor to the bailment to a receptor of goods attached only exempts the attaching officer for losses not occasioned by his neglect or misfeasance.

7. Where attachments were made on certain Bills of Exchange, by process issued from the Courts of the United States, *they were held* not to be dissolved in consequence of the defendant taking advantage of the insolvent law of Massachusetts, although such attachments on process from the State Courts would be dissolved. *Springer v. Foster.* 383

8. Under the circumstances of this case, the trustee was allowed only the costs and expenses incurred by him before the attachment, and the usual sum allowed for his costs, as trustee in this suit. *Ibid.*

9. The rule, applicable to a purchaser claiming land, with notice of a prior unrecorded attachment, does not govern the case of two creditors, proceeding by suit, *in invitum*, with a knowledge of the attachments of each other. In the latter case, each is entitled to any priority, which he can, through his diligence, lawfully obtain over the other.

Kent v. Roberts. 592
See SHERIFF.

BANKRUPTCY.

1. Where the property of a bankrupt is attached on *mesne process*, before proceedings in bankruptcy are instituted, if he obtain a discharge before any judgment is rendered in

such suit, it is pleadable as a bar to that very suit, and will prevent the attaching creditor from completing his attachment by a judgment.

Ex parte Foster. 132.

2. By a decree of bankruptcy, all the property and rights of property of the bankrupt are devested from him, and vest in the assignee as soon as one is appointed; and such decree relates back to the time of the petition; consequently, pending the proceedings in bankruptcy, before or after the decree, an attaching creditor will not be permitted to proceed in his suit against the bankrupt to trial and judgment, because there can be no party defendant properly before the Court. *Ibid.*

3. If an attaching creditor, knowing that proceedings in bankruptcy have been instituted, should nevertheless proceed in his suit to get a judgment against the bankrupt, before an assignee was appointed, it would be a fraud upon the law; and if such creditor should obtain satisfaction of his judgment, it *seems*, that he would not be allowed to hold the money. *Ibid.*

4. While the bankrupt proceedings are in progress, no attaching creditor, by a mere race of diligence, will be permitted to overreach and defeat the just rights of the other creditors, or the right of the bankrupt, if entitled to a discharge, to plead the same in bar of a judgment in such suit. In such a case, the Court will enjoin a creditor from proceeding further in his suit than is necessary to protect his ulterior rights, and will allow the writ and proceedings of the attaching creditor to be entered in the proper Court, and to be continued, if the creditor elect so to do, until the discharge of the bankrupt is obtained; but not to proceed in the mean time to trial or judgment. *Ibid.*

5. Where A. by a writ of attachment from the State Court, attached the goods of B.: and soon afterwards B. petitioned for the benefit of the Bankrupt Act; and then, fearing that

A. might proceed to get judgment before he could be declared a bankrupt and obtain a certificate of discharge, and levy his execution upon the goods attached, B. applied to the District Court for an order to stay further proceedings by A. in the suit, and for other relief; *It was held*, that the District Court had authority to control the proceedings of A. in the suit; and that A. might be permitted to enter his action and continue it; but he had no right, during the proceedings in bankruptcy, to proceed to a trial and judgment in the suit.

Ibid.

6. Whether, if the bankrupt fail to obtain his discharge, the attachment would be gone by the mere operation of the Bankrupt Act; or whether a judgment in *personam* may be rendered against him, *quære*.

Ibid.

7. Where a suit has been commenced *bona fide*, and the defendant becomes a bankrupt, the actual costs are to be paid out of the estate, but no subsequent costs.

Ibid.

8. By the Bankrupt Law of 1841, the District Courts of the United States are possessed of the full jurisdiction of Courts of Equity over all subject-matters arising in Bankruptcy.

Ibid.

9. A judgment upon property, attached on the writ, in Massachusetts, is a lien within the proviso of the second section of the Bankrupt Act of 1841, and is saved thereby, and is wholly unaffected by the proceedings in bankruptcy, when it has been regularly obtained, before any petition, or decree, or discharge in bankruptcy.

In the matter of Cooke. 376

10. Where property was attached upon *mesne process*, and *after judgment was obtained*, the defendant filed his petition to be decreed a bankrupt; *It was held*, that the right of the attaching creditor had attached absolutely to the property, and by the law of Massachusetts, remained a fixed and permanent lien, for thirty days after the judgment,

by means of which the creditor, at his election, might obtain a preference of satisfaction out of the property attached over all other creditors.

Ibid.

11. All the property and rights of property of the bankrupt, *at the time of the decree of bankruptcy*, pass to the assignee to be distributed amongst the creditors, with the other assets of the bankrupt.

Ex parte Newhall. 360

12. Property, which comes to a person, seeking the benefit of the Bankrupt Act, by descent, or as distributee, in the intermediate time between his filing his petition and his being declared a bankrupt, passes to the assignee as a part of the assets of the bankrupt.

Ibid.

13. The assignee takes the property and rights of property of the bankrupt, subject to all such rights and equities of third persons, as are attached to it in the hands of the bankrupt.

Ibid.

14. Where the bankrupt, after filing his petition, and before a decree of bankruptcy, became entitled to certain property, as heir to his mother, to whom, when alive, he was indebted; *It was held*, that the assignee of the bankrupt was only entitled to the bankrupt's moiety or distributive share, after deducting therefrom his debt to the estate.

Ibid.

15. Where a trader gives a mortgage to one of his creditors, in contemplation of bankruptcy, and for the purpose of giving such creditor a preference over the others, it is an act of bankruptcy within the meaning of the statute.

Arnold v. Maynard. 350

16. Where the Bankrupt Act speaks of a conveyance or transfer by a debtor "in contemplation of bankruptcy," it does not necessarily mean, in contemplation of his being declared a bankrupt under the statute, but in contemplation of his actually stopping his business, because of his insolvency and incapacity to carry it on.

Ibid.

17. Where a retailer of merchandise mortgaged his whole stock in trade, of the nominal value of four or five thousand dollars, and comprising the whole mass of his visible property, to a creditor, to secure to him the sum of about seventeen hundred dollars, and against a liability for about five hundred dollars, the debtor owing debts to the amount of five thousand dollars, then over due, and the whole amount arising from a sale of his goods at auction being less than five thousand dollars; *It was held*, that the debtor must be taken in law, to have known, that he was, at the time of making the mortgage, insolvent, and must stop and break up his business, and that the mortgage having been executed in order to give the mortgagee a preference or priority over the rest of his creditors, it was "in contemplation of bankruptcy" within the meaning of the statute.

Ibid.

18. Such a mortgage may subject the debtor to be proceeded against as an involuntary bankrupt, notwithstanding he did not, at the time of making it, intend to apply for the benefit of the bankrupt law, or to make himself liable to be proceeded against *in invitum*.

Ibid.

19. Nor does it make any difference as to the character of the act, whether the mortgage was voluntary and spontaneous on the part of the mortgagor, or was given upon the request or demand of the mortgagee, or upon a verbal promise made in general terms when the debt was contracted, to give security upon request, if at the time of giving it, the mortgagor knew that he was insolvent, and must stop his business, and intended thereby to give a preference or priority to the mortgagee over the rest of his creditors. *Ibid.*

20. A. and B. of Massachusetts, instituted several suits at law against a factory company in New Hampshire and several citizens of that State, in which property was attached on the writs. Various agreements

in writing were made by and between the parties, upon the conditions of which, the actions were continued from term to term, until they were defaulted at the August term of the Court, 1841, and the entry of judgment thereon, pursuant to a written agreement filed in Court at the said term, was made at the August term, 1842. Previously to this, several of the defendants had been decreed bankrupts on their own petition; and an injunction was obtained by their assignee, prohibiting the plaintiffs from levying their executions upon the property of the bankrupts. *It was held*, that the contracts, entered into between the parties, constituted an equitable lien, which remained in force, notwithstanding the decree of bankruptcy.

Parker v. Muggridge. 334

21. *Held, also*, that independently of the plaintiffs' claim as an equitable lien, they were entitled to have the injunction dissolved so far as respected the property owned by the bankrupts, and those of the defendants who had not petitioned to be declared bankrupts.

Ibid.

22. The general rule in bankruptcy is, that the property of partnerships is first to be applied to the discharge of the partnerships debts, and the surplus only is to be applied to the individual debts of any one partner. But if it be necessary, in order to make a final settlement of all claims, the Court may take upon itself the administration, as well of the partnership estate as of the estate of the bankrupt partner. *Ibid.*

23. Where one partner becomes bankrupt, his assignee can take that portion of the partnership assets only, which would belong to the bankrupt, after payment of all the partnership debts, and the solvent partner has a lien upon the partnership assets for all the partnership debts, and, also, for his own share thereof, before the separate creditors of the bankrupt can come in and take any thing.

Ibid.

24. Where a devise has been made

to a bankrupt, and accepted by him, it is a fraud upon his creditors for him to disclaim, or renounce it, and the Court will compel him to do all acts necessary to perfect his title to the devised estate.

Ex parte Fuller. 327

25. An estate was devised unconditionally to A. and his sister. Subsequently to this, but before the will had been admitted to probate, A. filed his petition to be declared a bankrupt. *Held*, that the estate, so devised, became the property of the assignee appointed in bankruptcy, so that he might sell and convey the same, as a part of the estate of A. *Ibid.*

26. The bankrupt law of the United States, upon going into operation in February, 1842, *ipso facto* suspended all action upon future cases arising under State insolvent laws, where the insolvent persons were within the purview of the bankrupt law.

Ex parte Eames. 322

27. Where A. took advantage of the insolvent law of Massachusetts, after the bankrupt law of the United States went into operation, and an assignee was duly appointed in pursuance of the law of Massachusetts, and A. subsequently petitioned to be declared a bankrupt under the law of the United States, *It was held*, that an injunction ought to issue against B. to restrain him from intermeddling with the property of A. *Ibid.*

28. It seems, that a person who has been declared a bankrupt, under the late Act of Congress, may enter into business and hold property, subject to the contingency of obtaining a discharge.

In the matter of Grant. 312

29. The Court has no authority to order an allowance to the bankrupt for the support of himself and family; but the assignee may make such allowance, not exceeding the sum of three hundred dollars; and he may also allow the bankrupt any reasonable sum for taking charge of the property. *Ibid.*

30. In general, the husband be-

comes entitled to the personal property, belonging to the wife, at the time of her marriage, unless his marital right be excluded by some express or implied trust; and his creditors may take it in execution or satisfaction of their debts. *Ibid.*

31. Such a trust may be expressly created, or it may be implied from the nature of the gift, or from other attendant and conclusive circumstances. *Ibid.*

32. Assignees in bankruptcy, except in cases of fraud, take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and they are affected with all the equities, which would affect the bankrupt himself, if he were asserting those rights and interests.

Mitchell v. Winslow. 630

33. A. and B. being engaged, in 1839, in the manufacture of cutlery, borrowed of C. a sum of money, payable in four years, with interest semi-annually, and on the same day gave him a deed of all the machinery in their manufactory, with all the tools and implements of every kind thereunto belonging and appertaining, together with all the tools and machinery, for the use of the said manufactory, *which they might at any time purchase for four years from that date, and also all the stock, which they might manufacture or purchase during the said four years.* On the 26th of August, 1842, A. and B. filed their petition to be declared bankrupts, and subsequently were so declared, and an assignee was appointed. On July 16th, 1842, for breach of the conditions of the mortgage, the agent of C. took possession of the property, including the machinery, &c. which were in the possession of the factory when the mortgage was made, and also machinery, tools, and stock in trade, which had been made and purchased after the execution of the mortgage. On petition of the assignee in bankruptcy of A. and B. for an order of Court authorising him to take possession, *It was held*:

1st. That the mortgage and the possession taken on July 16th, 1842, constituted such a lien in favor of the mortgagee to the property acquired subsequent to the time of executing the mortgage, as is protected under the provision in the second section of the Bankrupt Act.

2dly. That such stipulations in a mortgage, in regard to property subsequently acquired, protect such property from other creditors of the mortgagor.

3dly. *Quære*, as to the effect at law of such stipulations, in a controversy between a first and second mortgagee, as to property acquired, and *in esse* after the execution of the first mortgage, and before the execution of the second, both the mortgagees being *bond fide* purchasers for a valuable consideration, and the second mortgagee having no notice of the prior incumbrance. *Ibid.*

34. The assignee in bankruptcy, except in cases of fraud, stands in no better situation than the bankrupts themselves.

Winsor v. M'Lellan. 493

35. Certain bankrupts, some months previous to their bankruptcy, conveyed, by a bill of sale, as collateral security for a debt of \$2000, one half of a vessel, of which the other half was owned by the master, and agreed to assign all future policies of insurance thereon, as further security for the same debt, which was done, it being agreed, that the mortgagors might use the vessel for their own benefit, until default of payment. The bill of sale was not recorded. The vessel, at the time the bill of sale was made, was at sea, in the possession of the master. Between that time, and the filing of the petition for the benefit of the bankrupt law by the mortgagors, the vessel came once to Boston, the place of business and residence of the mortgagors, and twice to Bath, the place of business and residence of the master, but the mortgagees did not take possession. Five days before the filing of the

petition they sent notice to the master of the bill of sale. The said mortgaged moiety of the vessel having been sold by direction of the assignee; *It was held*, that the proceeds of the sale should be paid to the mortgagee. *Ibid.*

36. The fact, that one of the mortgagors made oath at the customhouse, subsequent to the bill of sale, that the vessel belonged to him and his partner, cannot affect the rights of the mortgagee. *Ibid.*

37. A. sued B. and trustees in October, 1843, in assumpsit, and as no defence existed, B. was, with his consent, defaulted. The cause was then continued for two successive terms, in order to ascertain, whether the trustees had any effects, when, no application having been made to take off the default, or to stay the proceedings, a final judgment was rendered against B. on May 26th, 1843, and execution issued on June 22d, 1843, and was levied on the real estate attached. On January 25th, 1843, B. petitioned for the benefit of the Bankrupt Act, and was declared a bankrupt on March 14th, 1843. C. was appointed his assignee on April 7th, 1843, and obtained from the District Judge a writ of injunction to restrain B. from proceeding in his suit, which was dissolved on the application of B. on April 28th, 1843. This bill was then brought, praying the Court to set aside the judgment, and to order the moneys levied upon to be paid over to the assignee, and for other relief. *It was held*, that, as the default was entered before the bankruptcy of B., and was entered without surprise, mistake, or fraud, but with the consent of B., and as no application had ever been made to take it off, that there was no good ground to set aside the judgment.

Fiske v. Hunt. 582

38. *It was also held*, that, as the suit brought in the District Court was not identical with the bill in the present case, the decision therein could not be pleaded as a flat

bar; but, since the relief asked of this Court was a matter in its sound discretion, and not of right, that the decision operated strongly to influence it in refusing to interfere in the matter. *Ibid.*

39. The doctrine in *Ex parte Foster* (ante, p. 132) affirmed. *Ibid.*

40. A petition for the benefit of the Bankrupt Act was filed in the District Court on the third day of March, 1843, about noon; the Act of the third of March, 1843, repealing the Bankrupt Act, passed Congress, and was approved by the President, late in the evening of the same day. *Held*, that the Court had jurisdiction of the petition at the time when it was filed and acted upon, and that it had full jurisdiction to entertain all proceedings thereon, to the close thereof, according to the provisions of the Bankrupt Act.

In the matter of Joseph Richardson. 569

41. The bill, in this case, asserted an equitable lien against certain shipments, and the proceeds thereof, in the hands of the assignee of James Read & Co. as security for advances made by the plaintiffs, under an agreement with James Read & Co. by which Read & Co. were authorized to make drafts on the plaintiffs in payment for merchandise, the said merchandise being pledged and hypothecated to the plaintiffs as collateral security for their advances. *It was held*, that the lien was good.

Fletcher v. Morey. 553

42. So, also, duties and charges upon the shipments having been paid by Messrs. Read & Co.; *It was held*, that they were not to be deducted from the value of the shipments, or the proceeds in the hands of the assignee, except in respect to such goods as came into the hands of the assignee, charged with those duties, since the bankruptcy. *Ibid.*

43. The assignee in bankruptcy takes the property and rights of the bankrupt, subject to all the liabilities and with all the rights, that would

attach to them in the hands of the bankrupt; the only exception is in case of fraud. *Ibid.*

44. The proviso in the second section of the Bankrupt Act of 1841, ch. 9, embraces all liens, equitable and legal, which are valid by the *lex loci contractus*, and is not restricted to such as can be enforced by State laws. *Fletcher v. Morey.* 569

45. Under the Bankrupt Act of 1841, ch. 9, the Circuit and District Courts have full jurisdiction in Equity, in respect to all cases arising in bankruptcy, to do all which is necessary and proper to accomplish the entire settlement and distribution of the bankrupt's estate, whether the proceedings be formal or summary.

Mitchell v. Great Works Milling and Manuf. Co. 648

46. Congress have a complete constitutional authority to enact a Bankrupt Act, giving to the District and Circuit Courts full jurisdiction in law and Equity. *Ibid.*

BILL OF EXCHANGE.

1. By the law of England, it seems, that a promise to accept a non-existing bill of exchange, even though it be taken by the holder upon the faith of that promise, does not amount to an acceptance of the bill, when drawn in favor of the holder. But it has been held otherwise by the Supreme Court of the United States.

Russell v. Wigginn. 213

2. In cases of a fluctuating balance between the drawee and the drawer of a bill of exchange, or where a drawer draws in the belief, that he has funds, or in the reasonable expectation, that he shall have funds to meet it, he is entitled to notice of its non-payment; but, otherwise, he is not.

In the matter of Brown. 502

See LETTER OF CREDIT.
INSOLVENT LAW, 2.

BILL IN EQUITY.

See EQUITY.

BILL OF SALE.

See SALE.

BOUNTY.

See COLLECTOR, 2.

CARGO.

See SHIPPING, 1, 2, 3, 4.

CARRIERS, COMMON.

1. The transportation of passengers, or of merchandise, by common carriers, does not necessarily imply, that the owners are not common carriers of bank notes or specie. The nature and extent of that employment or business which the owners expressly or impliedly hold themselves out as undertaking, furnishes the limits of their rights, duties, obligations, and liabilities.

Citizens' Bank v. Nantucket Steamboat Co. 16

2. No person is a common carrier, in the sense of the law, who is not a carrier for hire. It is not necessary, that the compensation should be a fixed sum; it is sufficient if it be in the nature of a *quantum meruit*, ensuring to the benefit of the owners. Nor is it necessary, that the goods or property should be entered upon a freight list, or the contract be verified by any written memorandum; although both may be important ingredients in ascertaining the true understanding of the parties, as to the character of the bailment.

Ibid.

3. Where a certain charter, incorporating the Nantucket Steamboat Company, granted a right to run a steamboat "for the transportation of merchandise," and the master thereof, being intrusted with a certain sum of money in bank-bills, lost it, or never duly delivered it; *It was held*, that the term "merchandise" does not apply to mere evidences of value, such as notes, bills, checks, policies of insurance, and bills of lading, but only to articles having an intrinsic value, in bulk, weight, or measure, and which are bought and sold; and that, in

order to render the Company liable, it must be clearly proved, that they had held themselves out to the public as common carriers of bank-bills for hire; and that they had authorized the master to contract on their account and not on his own, for the carriage thereof, which in the present case was not established by proof. *Ibid.*

It was also held, that the *onus probandi* was upon the libellants to make out a *prima facie* case, in the affirmative; and then the *onus probandi* of displacing this inference was shifted upon the Respondents. *Ibid.*

The knowledge of the owners, that the master carried the money for hire, would not affect them, unless the hire was on their account, or unless the master held himself out as their agent in that business, within the scope of the usual employment and service of the steamboat. *Ibid.*

CHARTER PARTY.

See SHIPPING, 1.

CHECKS.

1. The characteristics, which distinguish checks from bills of exchange, are, that checks are always drawn on a bank or banker; that they are payable immediately on presentment and without days of grace; that they are not presentable for acceptance, but only for payment. The want of due presentment of a check and of notice of the non-payment thereof, only exonerates the drawer in so far as actual damages have thereby resulted to him.

In the matter of Brown. 502

2. A check is an appropriation of the drawer's funds in the hands of the banker to the amount thereof, and consequently the drawer has no right to withdraw them before the check is paid. *Ibid.*

3. If the drawer of a check sustain no damage by want of due presentment and notice, and the non-payment of the check arise from

his own default, or from his want of funds, he is liable to the holder for the full amount of the check. *Ibid.*

4. The holder of a check is not bound to receive part-payment thereof, even if the bank be willing to pay it in part. He has a claim to the entire sum named therein.

Ibid.

5. Certain checks were drawn in favor of C. by Green, the general agent for D., as collateral security for a promissory note, made by them, payable to D. for his accommodation, which said note was discounted at the Grand Bank of Marblehead, and not being paid by D. was taken up by C. The checks, which were for \$703.50, \$726.52, respectively, were made payable to C. or order, on two certain days, and were presented on those days, but not on the last days of grace; but during the three days of grace, the drawer had not sufficient funds in the bank, on which they were drawn, to pay either, although there was a small balance there in his favor. *It was held*, that the checks were properly presented, and were not entitled to days of grace; that D. was not entitled to notice, and that, even if the checks had not been properly presented, and notice had not been properly given, D. was liable for money paid by C. at his request and for his use; that the fact, that they were payable at a certain day, and not on demand, did not change their nature from checks to bills of exchange, and that Green, being the general agent of D. was fully empowered to waive the presentment of the checks and the giving of notice.

Ibid.

CLERK.

1. By the Act of Congress of the 18th of May, 1842, ch. 29, where the offices of the clerk of the District Court and of the Circuit Court are held by the same person, he is entitled to a compensation not exceeding thirty-five hundred dollars as District clerk, and also to a compensation not exceeding twenty-five

hundred dollars as Circuit clerk, per annum. *U. S. v. Bassett.* 389

2. But the fees of the two offices are to be kept distinct, and if the fees of either do not amount to the maximum fixed by the Act, the deficiency should be placed to the account of the clerk, and cannot be made up from any excess in the fees of the other Court. *Ibid.*

3. Thus, where the two offices are held by one person, and his fees as District clerk amount to more than thirty-five hundred dollars, and his fees as Circuit clerk to less than twenty-five hundred dollars, he is entitled to the first mentioned sum as District clerk, and to the actual fees as Circuit clerk, and no more.

Ibid.

COLLECTOR.

1. Where the collector of Ipswich claimed a commission on drafts drawn by him on the collector at Boston, in payment of bounties due to fisherman, under the Act of 1813, ch. 34; *It was held*, that there being no provision by which a commission is allowed thereon, the collector could not charge a commission.

Andrews v. U. S. 202

2. The collector of any port, being authorized by the Act of 1817, ch. 262, § 7, to appoint a deputy, with the approbation of the Secretary of the Treasury; *it seems*, that a deputy, so appointed, should receive a reasonable compensation for his services, although no compensation therefor be fixed. *Ibid.*

3. All expenditures, made by a collector for office rent, clerk-hire, fuel, and stationary, are to be deemed incidents to his office, and should be allowed as proper charges against the United States; and if he do not keep and transmit yearly accounts thereof, according to the requisitions of the Act of 1799, ch. 129, § 2, he does not forfeit his right to be reimbursed for such expenditures, but only subjects himself to the payment of the penalty. *Ibid.*

4. By the Act of May 7th, 1822,

ch. 107, s. 9, providing for the salaries of Collectors and Naval Officers, the necessary expenses of the office are a primary charge upon the gross receipts or fund, and the officer is entitled to the remainder only, after such deduction; but he is not entitled thereby to receive \$3000, and to charge any deficiency below that sum in the receipts, to the Government. *Wentworth v. U. S.* 452

COLLISION.

1. A collision between two ships on the high seas, whether it result from accident or negligence, is, in all cases, to be deemed a peril of the seas, within the meaning of a policy of insurance.

Hale v. Washington Ins. Co. 176

2. It seems, that by the French law, the underwriter is not liable for those losses by collision, which are solely occasioned by the fault of the assured or his agents. *Ibid.*

3. Where a loss by collision arises from the negligence of the master and crew, the master is personally responsible; but the ship also is primarily, although not exclusively, liable for the compensation. *Ibid.*

4. All expenses, resulting as a direct and immediate consequence of a peril insured against, are covered by the policy. *Ibid.*

5. Where the ship *Columbia*, through the negligence or fault of her mate and crew, came into collision with the barque *Ritchie*, by which both vessels sustained damage; and the master of the *Columbia*, in behalf of his owners, paid to the owners of the *Ritchie* a certain sum, by way of compromise for the damage sustained by the latter vessel; *It was held*, that the underwriters on the *Columbia* were liable for the sum so paid, as well for the damages as for the repairs and losses by the collision, to the *Columbia*.

Ibid.

COMMISSION.

See WITNESS, 2, 3.

COMMON CARRIERS.

See CARRIERS.

CONSTRUCTION.

1. In the construction of written instruments, the intention of the parties is to be ascertained, not by parol evidence thereof, nor by mere conjecture, but by the application of certain rules of interpretation to the instrument itself.

Cleveland v. Smith. 278

2. Wherever there is a latent ambiguity in an instrument, as in the case of a mutual mistake in the descriptive words therein, the intention of the parties is to be collected from the instrument taken as a whole, and effect given thereto *cy pres*, and whatever is inconsistent therewith is to be rejected. *Ibid.*

3. The general rule, in the interpretation of the descriptive words of deeds and grants, is, that courses, distances, admeasurements, and ideal lines, must yield to known and fixed monuments upon the ground itself, whether they be natural or artificial. *Ibid.*

4. Where, in a grant of land from the Commonwealth of Massachusetts to the towns of Taunton and Raynham, the land was described as "beginning on the north line of the million acres at a yellow birch tree, six miles east from the south-east corner," &c. (the said birch tree being marked as a monument in the original survey of the land); whereas the said birch tree did not, in fact, stand upon the said north line, as supposed, but was so situated, that a gore of land was left between it and the said north line; *It was held*, that the said birch tree, and not the said north line, was to be taken as the boundary of the land granted. *Ibid.*

5. Penal Statutes must be strictly construed, and are never extended by implication.

Andrews v. U. S. 203

6. Statutes levying taxes or duties, on subjects or citizens, are to be construed most strongly against the government, and in favor of the

subjects or citizens, and their provisions are not to be extended by implication beyond the clear import of the language used.

U. S. v. Wigglesworth.

7. Statutes are to be interpreted so as to give effect to all the words therein, if such an interpretation be reasonable, and be neither repugnant to the provisions nor inconsistent with the objects of the statute; but the rule is otherwise, if such an interpretation require the introduction of new provisions and clauses to render it sensible or practicable.

U. S. v. Bassett. 389

COPYRIGHT.

1. An abridgment, in which there is a substantial condensation of the materials of the original work, and which requires intellectual labor and judgment, does not constitute a piracy of copyright; but an abridgment consisting of extracts of the essential or most valuable portions of the original work is a piracy.

Folsom v. Marsh. 100

2. An author of letters or papers of whatever kind, whether they be letters of business, or private letters, or literary compositions, has a property and an exclusive copyright therein, unless he unequivocally dedicate them to the public, or to some private person; and no person has any right to publish them without his consent, unless such publication be required to establish a personal right or claim, or to vindicate character.

Ibid.

3. The government has, perhaps, a right to publish official letters addressed to it, or to any of its departments, by public officers; but no private person has such a right, without the sanction of the government.

Ibid.

4. To constitute a piracy of an original work, it is not necessary, that the whole or the larger part of it should be taken; but it is only necessary, that so much should be taken as sensibly to diminish the value of the original work, or sub-

stantially to appropriate the labors of the author.

Ibid.

5. Where A. published a "Life of Washington," containing 866 pages, of which 353 pages were copied from Sparks's "Life and Writings of Washington," 64 pages being official letters and documents, and 255 pages being private letters of Washington, originally published by Mr. Sparks, under a contract with the owners of the original papers of Washington,—*It was held*, that the work by A. was an invasion of the copyright of Mr. Sparks.

Ibid.

CORPORATIONS, MANUFACTURING.

1. The Statute of Massachusetts of 1821, ch. 28, relating to the individual liabilities of the members of manufacturing corporations, is to be construed as a remedial statute, and the phrase "debts contracted," as employed therein, means not only debts in the strict sense of the term, but any liabilities incurred by the Corporation. If the liability be for unliquidated damages arising from contract or tort, it relates to the time of its origin, and not of its liquidation; and, therefore, *It was held*, that the testimony of Edson, who was a member of the Corporation at the time when the liability asserted in the present suit arose, must be rejected, although he had since sold out all his interest.

Carver v. Braintree Manufacturing Co.

433

COSTS.

See WITNESS.

Equity, 14, 15.

COURTS.

1. An application was made to the Supreme Court of Maine to allow the execution to be amended by inserting a direction to the sheriff of Aroostook county, on the ground, that the clerk had accidentally omitted it, which application the Court refused to grant; and *It was held*,

that this Court had no authority to review or overrule the decision by the State Court, it being in respect of a matter solely of local law.

Kent v. Roberts. 591

2. The Courts of the United States follow the decisions of the State tribunals in all questions dependent upon the local statute laws of the States. *Springer v. Foster.* 383

See ADMIRALTY, 3.

CUSTOM.

See USAGE.

DAMAGES.

1. The rule of damages in prize cases ordinarily supposes, that the vessel has been captured before she has arrived at the port of destination, and the Court, in *odium spoliatoris*, will presume the cargo to be worth more at the port of destination than the prime cost by 10 per cent. But to cases where the vessel has arrived at the port of destination this rule does not apply.

Arthur v. Schooner Cassius. 81

2. Where A. brought an action against B. for flowing back the water of the river Presumpscot, to the injury of his rights, as Riparian proprietor, and to the obstruction of his mills; *It was held*, that if the plaintiff could prove, that the natural flow of the stream was changed by any person, not having a legal right to change it, he could recover nominal damages, although no actual injury had been thereby occasioned to him.

Whipple v. Cumberland Manuf. Co. 661

3. Wherever a wrong is done to a right, the law imports damage; and if no substantial injury be proved to be thereby occasioned, nominal damages will be given in support of the right. *Ibid.*

4. In such cases, if the plaintiff establish his right of action, the jury may, if they choose, give him such damages as will fully indemnify him beyond what the taxed costs would reach, and may take into considera-

tion counsel fees, and other necessary expenses, fairly incurred by him in the case. *Ibid.*

See VERDICT.

DEMURRER.

1. The office of a demurrer to a Bill in Equity, is to bring before the Court the right to maintain a bill, admitting all its allegations to be true, and the Court will not, therefore, examine *aliunde*, what facts might or might not defeat it; for this is the office of an answer, or plea. *Ocean Ins. Co. v. Fields.* 59

See LETTER OF CREDIT, 2, 5.

DEPOSITION.

See WITNESS, 1, 2, 3.

DERELICT.

See SALVAGE, 1, 2.

DEVISE.

1. In a devise of real estate, the title passes to the devisee at the death of the testator, and the probate of the will relates back to that time.

Ex parte Fuller. 327

2. A devise by will vests in the devisee only upon his consent thereto; but when the devise is plainly for his benefit, as if it be of an unconditional fee, without trust or incumbrance, his consent will be presumed, and some solemn act is required to constitute a disclaimer or renunciation thereof. *Ibid.*

3. The provision in the Revised Statutes of Maine, chapter 92, section 25, in relation to the probate of wills, is merely affirmative of the law, as it antecedently stood. *Ibid.*

EQUITY.

1. A Bill in Equity will be sustained to set aside a judgment upon a policy of insurance, upon the ground of such newly-discovered evidence of fraud and felony on the part of the original plaintiff, as would, if pleaded, have been a perfect defence to the previous action; especially, if the felony were committed by a British subject in a

British vessel, on British waters; for the offence is not, in such case, punishable by the criminal law of this country.

Ocean Ins. Co. v. Field. 59

2. A Bill in Equity, although it charge a felony, may be sustained by proof; but the Defendant is not bound to make a discovery thereof.

Ibid.

3. Although a Court of Equity will not ordinarily grant relief, in cases after trial, where mere cumulative evidence of fraud or of any other fact is discovered, yet it will, wherever the defence was originally imperfectly made out from the want of distinct proof, which is afterward discovered; although there were circumstances of suspicion.

Ibid.

4. Under a Bill in Equity, proof is not admissible with respect to matters not alleged in the bill or answer; and, therefore, one of the parties, who claimed to be a purchaser for a valuable consideration, without notice, not having so stated in his answer; *It was held*, that evidence with regard to the fact was not admissible.

Barque Chusan. 456

5. Where a Bill in Equity was brought by A. as assignee of B., no waste being charged therein, and the subject-matter was referred to a Master to report thereon, who was not authorised to report upon the question of waste, but who nevertheless did, with the consent of the parties, report thereupon; *It was held*, that waste committed before the assignment could not be inquired into by an assignee; that all of the report pertaining to waste should be stricken out; that even, if such matter had been charged in the bill, the Master, not being directly authorised thereto, could not acquire any authority beyond his commission by the consent of parties.

Gordon v. Hobart. 243

6. Where A. mortgaged certain property to B. to secure a loan of \$3000, no rate of interest being

therein fixed, upon the agreement, that A. should take from B. a lease thereof at the yearly rent of \$270, which rent was paid until the mortgagee took possession; *It was held*, that the lease was a mode of securing usurious interest, and was, therefore, not valid; but that legal interest should be allowed in Equity, upon the \$3000, for the whole period.

Ibid.

7. There having been various business transactions between A. and B., and various notes received from A. by B., no specific application of which by the mortgagor was shown; *It was held*, under the circumstances, that the notes were not to be applied to the payment of the \$3000.

Ibid.

8. In suits in Equity, the proofs must, to be admissible, be to some allegations or facts charged in the Bill or Answer; and thus put in issue by the parties.

Langdon v. Goddard. 267

9. Therefore, where the Bill set up a title under a will, and yet, it relied upon a title under certain codicils thereto, which were not alluded to in the Bill; *It was held*, at the hearing, that the Bill was fatally defective.

Ibid.

10. Where a codicil is asserted to have been obtained by fraud, and afterwards to have been revoked, if the plaintiff mean to rely upon the codicil and its revocation, as a proof of fraud, in the defendant, and also to rely upon its being either destroyed by the defendant, or to be in his possession and suppressed, it is indispensable, that the Bill should allege the execution of the codicil and its revocation, and the fraud of the defendant in obtaining it, and also that he has destroyed it, or has it in his possession, and require a discovery of the facts, and of the contents of the codicil, otherwise these points cannot be used as evidence in the cause.

Ibid.

11. An answer, responsive to the allegations and charges in the Bill, will prevail in favor of the defend-

ant, as evidence, unless it be overcome by the testimony of two witnesses, or of one witness and corroborative circumstances. *Ibid.*

12. Where a bill alleged, that certain sugars were fraudulently invoiced at a sum less than "their actual cost and fair market value," which question was directly put in issue by the pleadings, and the judge charged the jury, "that if the goods were found to be invoiced below their fair market value, with intent to defraud, &c. they should find a verdict for the government," to which instruction exception was taken by the plaintiff; *It was held*, that the instruction was proper.

Alfonso v. U. S. 422

13. *Held*, also, that the agent of the claimants, having assumed, in his oath to the invoice or entry of the shipment, the position of a purchaser, he could not avail himself of the defence that he was not a purchaser, but a producer or manufacturer. *Ibid.*

14. Where a demurrer might be put into a bill in Equity, but, instead thereof, an answer is made, and the bill is dismissed on its merits, because the plaintiff does not show a sufficient title, the defendants are not entitled to costs.

Brooks v. Byam. 580

15. Costs in Equity are in the sound discretion of the Court; but, in the ordinary course of practice, when a bill is dismissed, costs are not awarded to the plaintiff. *Ibid.*

16. Under the circumstances of this case, *It was held*, that each party must bear his own costs, but that the expense of printing the record must be divided between them. *Ibid.*

17. The Equity Jurisdiction and Equity Jurisprudence administered in the Courts of the United States are coincident and coextensive with that exercised in England, and are not regulated by the municipal jurisprudence of the particular State, where the Court sits.

Fletcher v. Morey. 553

18. Certain persons associated

themselves together, under the name of the "Wilson Mill Privilege," and appointed A. and B. as their agents and attorneys, who took charge of their property, and erected buildings, and made improvements, and advanced money; afterwards, they obtained a charter and incorporation as "The Great Works Milling and Manufacturing Company," and voted to settle all the accounts of the agents, and ratified their proceedings, and continued A. as their agent; but no settlement of the agents' accounts was ever made, and the present bill being brought by their assignee, *It was held*, that it was a proper case for the interposition of a Court of Equity.

Mitchell v. Great Works Milling and Manuf. Co. 648

19. In matters of account Courts of Equity possess a concurrent jurisdiction with Courts of law, in most, if not in all cases, and where the case is one, wherein a Court of law could not afford an adequate redress, it is proper for the interposition of a Court of Equity. *Ibid.*

See DEMURRER, 1.

GIFTS, 6.

STAT. OF LIMITATIONS, 1.

EQUITY, 1, 2.

EQUITY OF REDEMPTION.

See MORTGAGE, 1.

EVIDENCE.

1. Where, in a writ of error, exception was taken to the admission by the Judge of the testimony of merchants and appraisers in Boston, in respect to the market value of sugars in Cuba; *It was held*, that, the market value being a question of opinion, as well as of fact, such testimony was admissible, as being in the nature of evidence by experts, and of the same degree as the evidence of merchants in Cuba.

Alfonso v. U. S. 421

2. Exception being, also, taken to the admission of certain evidence, as to prior fraudulent shipments to other parties, made by B., the ship

per of the sugar for the claimants, the Judge refused to affirm, that the evidence was improperly admitted.

Ibid.

3. Exception being, also, taken to the admission of other invoices of shipments in July and August, (this shipment being made in May,) to show the market value of sugar; *It was held*, that they were properly admitted.

Ibid.

See EQUITY, 3.

EXCESSIVE DAMAGES.

See VERDICT.

EXECUTION.

1. In a suit brought by A. an attachment was made of lands lying in Penobscot county; but before execution issued, the portion of this county, containing the said lands, was set off, as Aroostook county. The execution was directed to the sheriff of Penobscot county and was levied by his deputy, who was also a deputy of the sheriff of Aroostook county. In a suit, brought by B., an attachment on the same lands was made subsequent to the attachment by A. but execution was levied under the second suit and attachment before the county was set off. The present is a writ of entry brought by the demandant, who claims through A. against the tenant, who claims through B. *It was held*, that the levy of B. was not to be postponed to that of A.; that the deputy of the sheriff of Penobscot county had no authority to levy the execution of A. on lands without his county; and that, although the levy was made by a deputy of Aroostook county, yet, since it was not directed to the proper officer, and not made by the deputy in behalf of such officer, it was utterly void.

Kent v. Roberts. 591

See SHERIFF.

EXPERTS.

See EVIDENCE, 1

FEES.

See CLERK.

FELONY.

1. At Common Law, the civil rights of a party, injured by a felonious act, are only suspended until the rights of the government to punish it criminally have been satisfied. But a verdict and judgment thereupon are conclusive, as to the fact, in a suit upon any collateral matter connected therewith.

Ocean Ins. Co. v. Fields. 59

2. If the felony be not cognizable under the criminal law of the country, where civil redress is sought, the civil rights of the party seeking redress are not thereby suspended.

Ibid.

See EQUITY, 2.

FISHERIES.

See COLLECTOR, 2.

FRAUD.

See EQUITY, 1, 3.

SALE, 1 to 7.

STATUTE OF FRAUDS, 1.

FREIGHT.

1. Where freight was made payable "on delivery of the cargo at the port of Velasco,"—*It was held*, that until such a delivery, no freight could accrue; and that the master should have landed the cargo, and secured his lien for freight by placing it in the hands of his agent for the benefit of the owners, but subject to the freight.

Arthur v. Schooner Cassius. 81

See SHIPPING, 1.

GIFT.

1. Mourning rings given by third persons to the wife after her marriage are purely personal, and cannot be touched either by the husband or by his creditors.

In the matter of Grant. 312

2. A parent may make gifts to his children, if they be proper and suitable in his circumstances and condition; if they be not so, they enure

to the benefit of his creditors; but if the gifts have been purchased in part by third persons, the assignee, under the bankrupt law, can only claim the amount paid by the father.

Ibid.

3. Gifts after marriage, by third persons, may be expressly made for the sole and separate use of the wife, and if the husband consents to her receiving them, he and his creditors are bound by the trust.

Ibid.

4. In equity, gifts of personal ornaments or jewelry, made by a husband to his wife, for her sole and separate use, will be good against his personal representatives, in case of his death; but not against his own power to reclaim them during his life, nor against the right of his creditors to take them in satisfaction of their debts.

Ibid.

INDIGO.

See REVENUE LAWS, 1.

INSOLVENT LAW.

1. No State insolvent laws can discharge the obligations of any other contracts made in the State, than those, which are made between the citizens of that State.

Springer v. Foster. 383

2. Where certain bills of exchange were drawn in Pennsylvania on a citizen of Massachusetts, and were accepted by him in Massachusetts; *It was held*, that it was not competent for the Legislature of Massachusetts, by the Insolvent Act of 1838, to discharge the obligation of these contracts.

Ibid.

See ATTACHMENT, 7-28.

INSTRUCTION.

1. The Court is never bound to give an instruction to a jury on a point of law, in the precise form and manner in which it is put by counsel, but only in such a manner as comports with the real merits and justice of the case.

Pitts v. Whitman. 609

INSURANCE.

1. If the master of a vessel set sail on a voyage, with a crew in such a state of intoxication, as disables them at the time for the proper performance of the ship's duty, and any disaster arise therefrom; *it seems*, that any loss from that disaster would not be recoverable from the underwriters, under the common form of policies of insurance.

U. S. v. Hunt. 120

2. Over-valuation and misrepresentation of the value of the subject-matter of insurance, although they afford no conclusive proof of fraud, afford a very strong presumption thereof.

Ocean Ins. Co. v. Field. 59

See COLLISION.

DAMAGES, 1.

INTERPRETATION.

See CONSTRUCTION, 1, 2.

INTERPRETATION OF PATENTS.

See PATENT, 14.

INVENTION.

See PATENT.

JETTISON.

1. In case of jettison of goods, their value is generally to be estimated at their prime cost, or original value; or, if the vessel have arrived at her port of destination, at their value at such port.

Rogers v. Mechanics' Ins. Co. 173

JURISDICTION IN ADMIRALTY.

See ADMIRALTY.

JURY.

See INSTRUCTION, 1.

VERDICT, 1.

LAND, SALE OF.

See SALE, 1.

CONSTRUCTION, 4.

LETTER OF CREDIT.

1. A promise contained in a letter

of credit, written by persons, who are to become the drawees of bills drawn under it, promising to accept such bills when drawn, which letter is designed to be exhibited for the purpose of inducing persons to advance money on it and take the bills when drawn, is an available contract in favor of the persons, to whom the letter of credit is shown, who advance money and take the bills on the faith thereof.

Russell v. Wiggins. 213

2. A. of Boston, the agent of a banking house in London, gave a letter of credit to B. authorising C. who was about to proceed to the East Indies, to value on the said bankers to a certain amount, engaging, that the bills should be duly honored when presented; B. at the same time made the usual arrangement to remit to the said bankers in London sufficient funds to meet the payment of all bills, which might be drawn by virtue of the said credit; but failed to do so. The said letter of credit was taken to Manilla by C. to procure a cargo, and the plaintiffs, on the strength of the letter, furnished a cargo and received from C. bills on the said bankers to the amount limited in the said letter of credit. Most of the bills so drawn, were paid at maturity; others were protested for non-acceptance and for non-payment, and were returned to Manilla, and paid by the plaintiffs, who were also obliged to pay and did pay more than one re-exchange.

It was held:

1st. That the said letter of credit was to be deemed to be made in Massachusetts, and as to its obligation, construction and character, was to be governed by the laws of Massachusetts, and not by the laws of England. *Ibid.*

2dly. That the plaintiffs were entitled to maintain an action against the said bankers and to recover the amount of the damages sustained by the refusal of the defendants to accept the bills. *Ibid.*

3dly. That the plaintiffs were en-

titled to recover the whole damages, costs, and expenses paid by them, including re-exchange, with interest of the place, where the money was payable by the plaintiffs. *Ibid.*

LICENSE.

See PATENT, 16 to 20.

APPORTIONMENT, 3.

LIEN.

1. Where a lien, or equitable claim, constituting a charge in rem, is a matter of agreement, it will be enforced in equity, not only upon real estate, but also upon personal estate, or money in the hands of a third person; and against the party himself, or his personal representatives, or persons claiming under him, or assignees in bankruptcy.

Fletcher v. Morey. 553

2. An equitable lien is valid by the laws of Massachusetts, although no remedy for its enforcement is provided by the State jurisprudence. *Ibid.*

3. By the common law, liens exist only in cases, where the party, entitled thereto, has either actual or constructive possession of the goods; but in the maritime law, and in Equity, they exist independently of possession. *Ex parte Foster.* 132

4. A lien in Equity is not a property in the thing; nor does it constitute a right of action for the thing; but is a charge upon the thing. *Ibid.*

5. The Barque Chusan, belonging to Massachusetts, being libelled for materials supplied for repairs done to it in the port of New York; *It was held*, that a lien therefor attached to the barque, as being a foreign vessel; but that the nature, extent, and character of such a lien is to be determined by the general maritime law, and not by the local law of any particular State; and, therefore, that it was not destroyed by the departure of the barque from New York, according to the Statute of New York of 1829, vol. 2. p. 493.

The Barque Chusan. 456

6. By the general maritime law, material men have a threefold remedy for supplies and materials furnished to a foreign ship; 1st, against the vessel; 2dly, against the owners; 3dly, against the master; and neither remedy is displaced, except upon proof that an exclusive credit was given to one of the parties, or to the vessel. *Ibid.*

7. The lien of material men upon the vessel must be enforced within a reasonable time after the debt is due, or it will not avail against a *bona fide* purchaser, without notice. *Ibid.*

8. The Statute of New York (Revised Stat. 1829, pt. 3, ch. 8, tit. 8, s. 1, vol. 2, p. 493,) giving a lien to material men for repairs and supplies, &c. is to be considered as remedial in its nature, and not as restrictive; and is perfectly constitutional, as applied to cases of domestic vessels, but not as applied to foreign vessels. *Ibid.*

See SALE, 11.

MORTGAGE, 1, 5.

BANKRUPTCY, 9, 10, 20, 21,
33, 35, 36.

MANUFACTURING CORPORATIONS.

See CORPORATIONS.

MARITIME JURISDICTION.

See ADMIRALTY, 1, 2, 3.

MATERIAL MEN.

See LIEN.

MILL.

See DAMAGES.

MISREPRESENTATION.

See INSURANCE, 2.
SALE, 1 to 7.

MORTGAGE.

1. Where, in a Bill in Equity, to redeem a mortgage given to secure

the mortgagee against an incumbrance upon another estate purchased by him, the plaintiff claimed as owner of the Equity of Redemption, against the defendant, who was assignee of the mortgage, and the bill did not set forth, that the condition of the mortgage had been fully performed and the incumbrance extinguished; *It was held*, on demurrer, that although, in law, the mortgagor could not recover the land mortgaged from the mortgagee, and those in possession under him, without an actual extinguishment of the incumbrance, yet that, in Equity, he was entitled to maintain a bill to redeem upon an offer to redeem, and proving himself able and ready to discharge the incumbrance and procure releases thereof, and of claims on account thereof.

Upham v. Brooks. 623

2. Where A. was the legal owner of land, which he held in trust for B. as security for advances made by him on account of the purchase by B., *It was held*, that A. was a necessary party to a bill brought by B. in respect of a claim arising upon such lands; and, as the bill did not make him a party, *It was held*, on demurrer, not to be maintainable. *Ibid.*

3. Where a mortgage or a lien is created on chattels by contract, it is competent for the parties to agree, that the possession and use thereof shall be retained by the mortgagor until the breach of the condition, or by the debtor until the creditor shall assert his rights against it as a security for the debt.

Mitchell v. Winslow. 130

4. By the Revised Statutes of Massachusetts, it is not necessary, as between the parties themselves, that a mortgage of personal property should be recorded.

Winsor v. McLellan. 493

5. Liens and mortgages of personal property are perfectly good, as between the parties, and against creditors, although the possession remain with the owner or mortgagor, if there be no fraudulent intent.

The same rule applies to sales of personal property.

Fletcher v. Morey. 553

See EQUITY, 6.

SALE, 8.

BANKRUPTCY, 19, 35, 36,
37, 38.

NAVAL OFFICER.

See COLLECTOR, 5.

NAVIGATION.

See ADMIRALTY, 2.

NOTE.

See PROMISSORY NOTE.

OFFICER.

1. Every public officer is required to perform all duties, which are strictly official, although they may be required by laws passed after he comes into office, and may be cumulative upon his original duties, and although his compensation therefor be wholly inadequate. In such a case, he must look to the bounty of Congress for an additional reward.

Andrews v. U. S. 202

2. Where an officer is sued for any official misfeasance, the plaintiff can recover only his actual loss, arising therefrom.

Pierce v. Strickland. 292

OFFICIAL MISFEASANCE.

See OFFICER.

PARTNERSHIP PROPERTY.

See BANKRUPTCY, 25.

PATENT.

1. Patents for inventions are not granted as monopolies or restrictions upon the rights of the community, but "to promote science and the useful arts," and are to be liberally construed. *Blanchard v. Sprague.*

2. The power of Congress to grant to inventors is general; and it is in their discretion to say, when, and for what length of time, and under what circumstances, the patent for an invention shall be granted.

Ibid.

3. Congress has power to pass an act, which operates retrospectively to give a patent for an invention already in public use; but no act will be construed to operate retrospectively, unless such a construction is unavoidable. *Ibid.*

4. In the present case, *It was held*, that the patent was for a machine, and not for a principle or function; and, therefore, was valid. *Ibid.*

5. The application of an old process to produce a new result, is not a patentable invention; there must be, also, some new process or mode. But the production of an old result by a new process is patentable.

Howe v. Abbott. 190

6. Where a patent was taken out for a combination and an entire process; *It was held*, that the use of a part of the process and combination was not an infringement thereof.

Ibid.

7. A machine is only patentable, when it is substantially new; but the application of an old machine to a new process is not patentable.

Benn v. Smallwood. 408.

8. In the present case the invention was held not to be patentable, because it was merely the application of an old apparatus to a new purpose. *Ibid.*

9. Where the plaintiff, in the specification of his patent, claimed as his invention "an improvement in the construction of the axles or bearings of railway, or other wheeled carriages," and it appeared, that the improvement, though it had never before been applied to railway carriages, was well known as applied to other carriages; *It was held*, that the patent was not good.

Winans v. Prov. R. R. Co. 412

10. The Patent Act of 1836, ch. 357, sect. 13, and the Act of 1837, ch. 45, sect. 8, authorising the re-issue of a patent, because of a defective or redundant specification or description, without fraud, or for the purpose of adding thereto an improvement, do not require the patentee to claim, in his renewed patent,

all things, which were claimed in his original patent, but gives him the privilege of retaining whatever he deems proper.

Carver v. Braintree Manufacturing Co. 432

11. Where the plaintiff, in a patent for "a new and useful improvement in the ribs of the cotton gin," claimed, as a part of his invention, the increasing the space between the upper and lower surface of the rib, either "by making the ribs thicker at that part, or by a fork, or by any other variation of the particular form;" *It was held*, that the claim was sufficiently accurate as a matter of law, and that it was not necessary, that he should describe all possible modes by which the rib might be varied, but only the most important, and that mere formal variations therefrom would be violations of the patent. *Ibid.*

12. Objections, that a patented invention is old; or that the specification in a patent does not clearly describe the mode of making the machine; or that the original and the renewed patent are not for the same invention; or that either were obtained with a fraudulent intent; all involve matters of fact, and are for the jury, upon the evidence, to decide. *Ibid.*

13. Where the original patent was for "a new and useful improvement in the ribs of saw gins for ginning cotton," and the renewed patent was for "a new and useful invention in the manner of forming the ribs of saw gins for ginning cotton," and in the renewed patent was claimed, in addition to the thickness of the rib, the sloping up of it so as to leave no shoulder; *It was held*, that the claim in the renewed patent, was not for two distinct improvements, but for additional parts of the same improvement, and that the same thing was patented in both patents. *Ibid.*

14. Patents are to be interpreted by a consideration of the whole instrument, and it is to be thereby de-

termined what thing is intended to be patented.

15. A patentee of friction matches, by a deed under seal, undertook as follows: "to grant, bargain, sell, convey, assign, and transfer to B. his executors, administrators, and assigns, the right and privilege, hereinafter mentioned, of making, using, and selling the friction matches," patented, and to have and to hold "the right and privilege of manufacturing the said matches, and to employ in and about the same six persons, and no more, and to vend the said matches in any part of the United States." *It was held*, that this was a license or authority from the patentee, and need not be recorded in the Patent Office, under the Patent Act of 1836, ch. 357, s. 11.

Brooks v. Byam. 525

16. A license need not be recorded in the Patent Office, unless there be some positive provision of the Patent Act, which renders it an indispensable prerequisite to its validity. *Ibid.*

17. The recording within three months, according to the Statute, is merely directory; and any subsequent recording of an assignment will be sufficient to pass the title to the assignee, except as to intermediate *bona fide* purchasers, without notice. *Ibid.*

18. The Patent Act of 1826, ch. 357, s. 11, provides for the recording of three kinds of assignments, and of no others: first, an assignment of the whole patent; secondly, an assignment of any undivided part thereof; and, thirdly, a grant or conveyance of the exclusive right under the patent within any specified part of the United States. *Ibid.*

19. *It was held*, that the right granted by the above deed was a license or authority, coupled with an interest in the execution, to the grantee and six persons to be employed by him in making matches; that the right was an entirety, incapable of being apportioned or divid-

ed among different persons; that, therefore, an assignment by B. of a right to make as many matches as one person could roll up, was void.

Ibid.

20. *Quere*, if the license is not such a personal privilege, that the entirety cannot be assigned, notwithstanding it was given to B. and his assigns.

Ibid.

21. Where the plaintiff, in the specification of his patent, described his invention to be "a new and useful improvement," whereas, in fact, it consisted of a combination of several improvements, distinctly set forth in the specification; *It was held*, that the patent was good, not only for the combination, but for each distinct improvement, so far as it was his invention, and that the descriptive words were to be construed in connection with the specification.

Pitts v. Whitman. 609

22. Where the plaintiff claimed, as his invention, "the construction and use of an endless apron, divided into troughs and cells, in a machine for cleaning grain, operating substantially in the way described," *It was held*, that the claim was for a combination of the endless apron with the machine for cleaning grain, and that, if the combination were new, it was patentable, although a part of the apparatus were old. *Ibid.*

23. The Act of 1836, ch. 357, s. 11, relating to the recording of assignments of patents, is merely directory, for the protection of *bona fide* purchasers without notice, and does not require the recording of an assignment within three months, as a prerequisite to its validity. *Ibid.*

24. It is immaterial whether an assignment of a patent, offered in evidence, was recorded before or after the suit was brought. *Ibid.*

25. A motion having been made in arrest of judgment in this case, on the ground, that no description of the patent was set forth in the declaration, *It was held*, that the profert of the letters patent made

them, when produced, a part of the declaration, and gave the invention all the requisite certainty. *Ibid.*

PAYMENT.

1. In this case, one of the owners gave a note to the libellants, as payment for their claim, and, subsequently, on settling with the other owner, who was the master of the Chusan, he charged his portion thereof to the master; and, *It was held*, that the master was not thereby relieved from liability to the libellants, it being a matter between the owners solely.

The Barque Chusan. 457

2. Where the libellants, being ship-chandlers, furnished materials to the barque Chusan, while in New York, and took therefor the promissory note of one of the owners, and gave a receipt, *it was held*, that the matter was governed by the *lex loci*, by which a note taken for a debt is only conditional payment, until it is duly paid. *Ibid.*

PENAL STATUTES, CONSTRUCTION OF.

See CONSTRUCTION.

PENALTY.

See COLLECTOR, 4.

PRIZE CASES, DAMAGES IN.

See DAMAGES, 1.

PROBATE.

See WILLS.

PROMISSORY NOTE.

1. Where a note became due on Saturday, and was duly presented and dishonored, and the indorser lived in another State; *It was held*, that notice of the dishonor should, in order to bind the indorser, be put into the mail of the succeeding Monday, early enough to go by the mail of that day to the place of residence of the endorser, it appearing that the mail on that day did not close until half-past three o'clock, P. M.; other-

wise the indorser would be discharged.

Seventh Ward Bank v. Hamrick. 416

2. If, after a note is dishonored, and notice is given to the payee, who is the first indorser, an arrangement be made with the holder, by the maker of the note, and the subsequent indorsers thereon, without the consent of the payee, to prolong the credit, and to discount, by way of renewal, certain bills, drawn by the maker and one of the indorsers, and duly accepted, for the amount of the note, and in the mean time, and until the maturity of the bill, the note is to be deemed extinguished as to the maker, and the indorsers, who have given the bills, the original payee of the note is discharged thereby. *Ibid.*

See PAYMENT.

PUNISHMENT OF SEAMEN.

1. The authority of the officers in a merchant-ship, to compel obedience and inflict punishment, is of a summary character, but is not of a military character.

U. S. v. Hunt. 120

2. The right of the mate or other officers of a ship to inflict punishment on the seamen, when the master is on board and at hand, can be justified only by the immediate exigencies of the sea service, or as a necessary means to suppress mutinous, illegal, or flagrant misbehavior on the part of the seamen, or to compel obedience on the part of the seamen to orders, or other duties, which require prompt and instant action and interference on the part of the officers, and admit of no delay. In general, it is the duty of the officers to consult the master as to the infliction of punishment. *Ibid.*

RECORDING OF LICENSE.

See PATENT, 16.

RELEASE.

1. But in the case of a release, produced by a party to a suit, to

establish his own title he must prove its due execution by the subscribing witness.

Citizens' Bank v. Nantucket Steamboat Co. 16

2. A release of all actions and causes of action, or of a particular cause of action, which has happened before the time of the release, will discharge the witness from all liability, dependent upon the event of the suit, in which he is called to testify, touching his conduct in the matters on which the suit is founded.

3. Where, in answer to a cross interrogatory, proposed by counsel in a deposition, as to whether the witness had received a release from all liabilities, the witness produced the release from his own possession, as a part of his testimony; *It was held*, that he need not prove the execution of the release by the subscribing witness. And the question having been asked by the respondents, in order to establish the competency of the party as their own witness, they were estopped from denying it. *Ibid.*

REPAIRS.

See LIEN, 1.

REVENUE LAWS.

1. The Act of July 14th, 1832, ch. 225, sect. 24, levies a duty of 15 per cent. *ad valorem*, on indigo. The Act of March 2d, 1833, ch. 46, sect. 5, declares, that it shall be free from duty after June 30th, 1842. The Act of 1841, ch. 21, sect. 1, levies a duty of 20 per cent. *ad valorem*, on all articles imported into the United States after September 30th, 1841, which were then free or chargeable with a duty less than 20 per cent. *ad valorem*, except on certain enumerated articles, among which is indigo, "which shall pay respectively the same rates of duties imposed upon them under existing laws." *Held*, that the Act of 1841 did not lay a permanent duty of 15 per cent. *ad valorem*, on indigo, but left the

duty thereupon as it stood under the Act of 1833, and to expire after the 30th of June, 1842, and, therefore, that no duty was due upon it by the Act of August 30th, 1842, ch. 270, sect. 25. *U. S. v. Wigglesworth.*

2. *It seems*, that the Revenue Act of 1799, ch. 28, only applies to cases, where an actual purchase has been made. *Alfonso v. U. S.* 422

3. The phrase "actual cost" in the revenue Act of 1799, ch. 128, means the actual price paid in a *bona fide* purchase, and not the market value. *Ibid.*

See CONSTRUCTION, 6.

SALE.

1. The plaintiffs brought an action against the defendant for fraudulent misrepresentations in a sale of lands by the defendant to the plaintiffs. It appeared, that, between the time of the sale in 1835 and the time when this suit was brought in 1841, the plaintiffs had paid the purchase-money, without objection; that they had sold great quantities of the land, and that the value of the lands had greatly diminished. The defendant did not pretend to be well acquainted with the township, or to have explored it, but expressly told the plaintiffs' agent, Chamberlain, to examine for himself. Chamberlain did make an examination, and gave his estimate to the plaintiffs, being 51,000,000 of feet of timber. At the request of the plaintiffs, another exploration was made in 1836 of the whole lands, by Messrs. Farnham, who estimated the pine timber at 18,480,000 feet, and the hemlock at 27,704,000. But the plaintiffs did not apply to rescind the contract before this suit.

Sanborn v. Stetson. 481

2. The first count charged a misrepresentation, that the plaintiff had not cut, nor permitted any one to cut, any pine timber from the land; but *it was held*, that this representation was not proved to be fraudulent, or material under the circumstances. *Ibid.*

3. The second count charged, that the plaintiff showed tracts, as samples of the whole land, which were of superior value, and had more timber on them than the rest. But this count was not sustained by the evidence. *Ibid.*

4. The third count charged a fraudulent exhibition of a dotted map as a true plan of the pine timber on the land. But it appeared that the map only represented the position of the timber on the lot, and not its quantity; and as the *quantity* was the only material inquiry, and no fraudulent intent was proved, this count was not sustained. *Ibid.*

5. The fourth count charged a fraudulent representation, that the lots contained 50,000,000 of feet of timber, whereas they only contained about 20,000,000; but it appeared, that this representation was made by Chamberlain, the plaintiff's agent, and was merely his estimate, and no fraudulent intent was proved. *Ibid.*

6. The fifth count charged false representations as to the quantity of timber on certain lots. But it appeared, that these representations were made by the agents of the plaintiff, and were his estimates. *Ibid.*

7. On the whole case, *it was held*, that the plaintiffs were not entitled to recover. *Ibid.*

8. A bill of sale of one half of a vessel, as collateral security for a debt, with a provision, that the mortgagors may keep possession of the vessel, and use her for their own benefit until default of payment, is valid, as an immediate conditional sale.

Winsor, ass. v. McLellan. 492

9. Delivery of possession, to a purchaser, of a moiety of a vessel, when in the possession of the other part owner, is not, in general, indispensable to pass the property. *Ibid.*

See MORTGAGE, 5.

10. As between the mortgagor and mortgagee notice to the part-owner in possession is not necessary. *Ibid.*

11. A *bond fide* purchaser, for a valuable consideration, without notice of any defect in his title, who makes improvements and meliorations upon the estate, has a lien or charge upon the estate for the increased value, which is thereby given to the estate beyond its value without them, and a Court of Equity will enforce the lien or charge against the true owner, who recovers the estate in a suit at law against the purchaser.

Bright v. Boyd. 605

See STATUTE OF FRAUDS.

SALVAGE.

1. The general rule in the Admiralty, in cases of derelict, is to allow one moiety of the property saved to the salvors; but this allowance may be enlarged by the circumstances of a particular case, where the services performed are of an extraordinary nature.

Sprague v. One Hundred Barrels of Flour. 195

2. Under the circumstances of the present case, one moiety of the gross proceeds of the value of the property was decreed to the salvors, with full costs and expenses; the latter to be a charge exclusively upon the other moiety. *Ibid.*

SEAMEN, PUNISHMENT OF.

See PUNISHMENT.

SET-OFF.

1. All actions and matters of difference between the parties having been referred to referees, they made separate reports, upon which executions issued and were placed in the hands of the sheriff. Before the executions were issued, one of the parties assigned the amount he might recover to third persons, who had full notice of all the facts. *Held*, that the assignee was not protected by the proviso of the statute of Maine, of the 13th March, 1821, ch. 6, sect. 4, the claim not having been "assigned to him *bond fide* and without fraud;" and that the original

parties having mutual executions against each other, the sheriff had a right to set off one against another, notwithstanding the notice given to him of the assignment.

Wood v. Carr. 366

SHERIFF.

1. At the common law, if a sheriff seize goods on execution, and go out of office before the sale thereof is completed, he may proceed to sell them. *Kent v. Roberts.* 592

2. *It seems*, that where an attachment is made by a sheriff, who resigns his office before execution issues, he is not the proper officer to levy it. *Ibid.*

3. Upon general principles, a sheriff can only levy upon such real estate as is within his county. *Ibid.*

See EXECUTION.

SHIPPING.

1. Where the schooner *Cassius* was chartered to the master, as owner, for a certain voyage, and by the terms of the charter-party, the general owners were to share the freight with the master; *It was held*, that the general owners were directly liable, as owners, for the voyage; and that the claim of the shippers for damages was not restricted to the master personally, although their agreement was made solely with him.

Arthur v. Schooner Cassius. 81

2. Where, also, the master was, by his agreement with the shippers, to deliver the cargo at Velasco, but upon his arriving there, the consignee refused to receive it,—*It was held*, that, as the cargo was not of a perishable nature, the master was bound to land it at Velasco, and store it for the benefit of the shippers, and could not carry it to another port, nor sell it; although it could not be sold at Velasco. *Ibid.*

3. But as the master had carried the cargo to New Orleans, and sold it, *It was held*, that the libellants were entitled to receive the actual value of the cargo at Velasco at the time

when the same might have been there landed, deducting all duties and charges, and the freight for the voyage, as if the cargo had been duly landed. *Ibid.*

4. Where a ship is abandoned for a total loss, the Master cannot sell the cargo, and invest the proceeds in other goods, unless he be justified by necessity, or by a high degree of expediency. But if he do make such a sale and investment, when they are unnecessary or inexpedient, yet, if the parties interested receive the property without objection, and adopt the acts of the Master, they must bear all proper charges thereupon. If, however, they receive the property, reserving their rights and waiving no objections, and it do not yield a profit beyond the fair value of the property shipped, they are liable for no charges upon it; but if it do yield such a profit, and the Master act without fraud, he is entitled to be paid a reasonable compensation and his reasonable expenses, not exceeding such profit.

Lawrence v. New Bedford Ins. Co. 472

STATUTE.

See TIME.

STATUTES COMMENTED ON.

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| 1799, ch. 129, § a. | } Salaries of Col-
lectors and Naval
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| 1829, Rev. Stat., vol. 2, pl. 3, ch. 8, tit. 8, § 1. | } Lien of Material
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| Rev. Stat. ch. 92, § 25. | Probate
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| 1821, ch. 28. | Manufacturing
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STATUTE OF FRAUDS.

1. Where an agreement was made for the purchase of lands, and the following paper was given,—“*Ellsworth, Dec. 15, 1834. Received of Daniel Burnham and Cyrus S. Clark, one thousand dollars to be accounted for if they shall furnish me satisfactory security for certain lands on the Naraguagus River, say one hundred and nineteen thousand acres, for one hundred and thirteen thousand dollars, on or before Friday morning next; otherwise to be forfeited. JOHN BLACK.*”—*It was held* to be a sufficient memorandum of the terms of sale, under the Statute of Frauds. *Clark v. Burnham.* 1

2. But a parol agreement having been subsequently substituted therefor, by which the said land was transferred, by deed, to other persons than those therein mentioned, and a bill being brought by Clark to recover a certain part from the grantees, as a resulting trust to him; *It was held*, that the written memorandum only created a presumption of a resulting trust, which could be rebutted by proof; and proof being given, that Clark did not advance any portion of the purchase-money, as stated in the memorandum; *It was held*, that he was not entitled to a resulting trust, and that the Contract was within the Statute of Frauds. *Ibid.*

STATUTE OF LIMITATIONS.

1. This action was brought only two days before the statute of limitations would have barred the suit; but *It was held*, that although in a bill in Equity for relief, or to rescind the contract, the staleness of the claim, and the want of diligence of the plaintiffs, and the lapse of time, would have rendered the claim un-maintainable; yet that, at law, the plaintiffs were not barred thereby.

Sanborn v. Stetson. 481

TIME.

1. By the Constitution of the United States, every bill takes effect as

a law, from the time when it is approved by the President, and then its effect is prospective and not retrospective.

In the matter of Joseph Richardson. 571

2. The doctrine, that, in law, there is no fraction of a day, is a mere legal fiction, and is true only in respect to cases where it will promote right and justice. *Ibid.*

See BANKRUPTCY, 39.

USAGE.

1. *Quære.*—Whether usages and customs can be introduced as evidence to control the construction of contracts, and the principles of law.

Citizen's Bank v. Nantucket Steamboat Co. 16

USURY.

See EQUITY, 6.

VERDICT.

1. A verdict will not be set aside, in a case of *tort*, for excessive damages, unless it clearly appear, that the jury committed some gross and palpable error, or acted under some improper bias, influence, or prejudice, or have totally mistaken the rules of law by which the damages are to be regulated.

Whipple v. Cumberland Manufacturing Co. 662

WASTE.

See EQUITY, 5.

WATER COURSE.

See DAMAGES.

WILLS.

1. The State Courts have exclusive jurisdiction over the Probate of wills and codicils; and the Probate thereof in the proper State Court is conclusive. *Langdon v. Goddard.*

WITNESS.

1. The Judicial Act of 1789, ch. 20, § 30, does not peremptorily ordain, that the testimony of witnesses, living more than a hundred miles from the place of trial, shall be taken by deposition; but it only permits such a course; and if such witnesses be present in Court at the trial, and give their testimony orally, the full costs of their travel and attendance should be allowed in the costs.

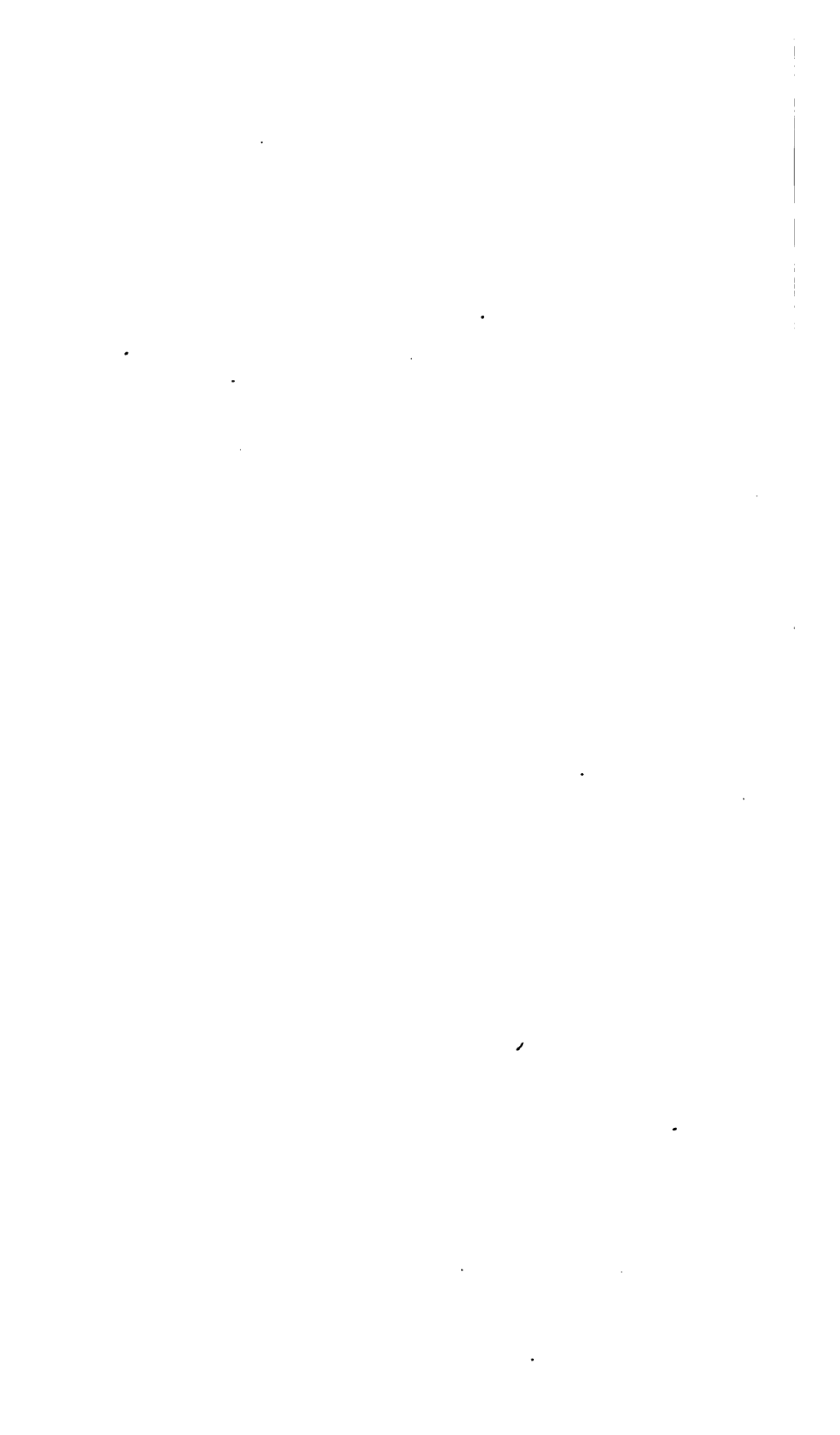
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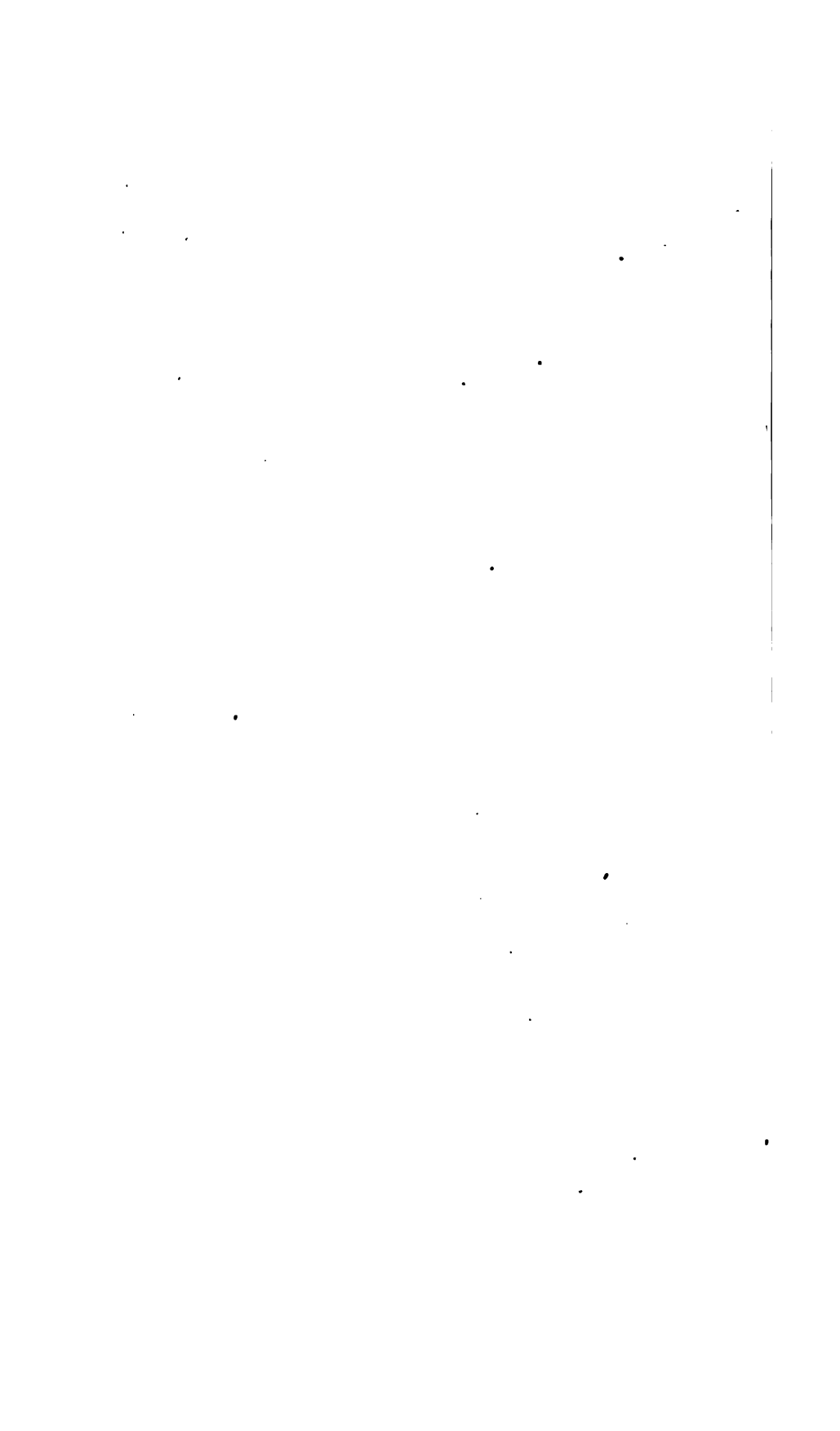
2. By the Statute of 1 Will. IV. ch. 22, giving authority to English Courts of Law to issue commissions for the examination of witnesses abroad, the Court may, in its discretion, allow the expenses of the witnesses, or the costs of the commission. *Ibid.*

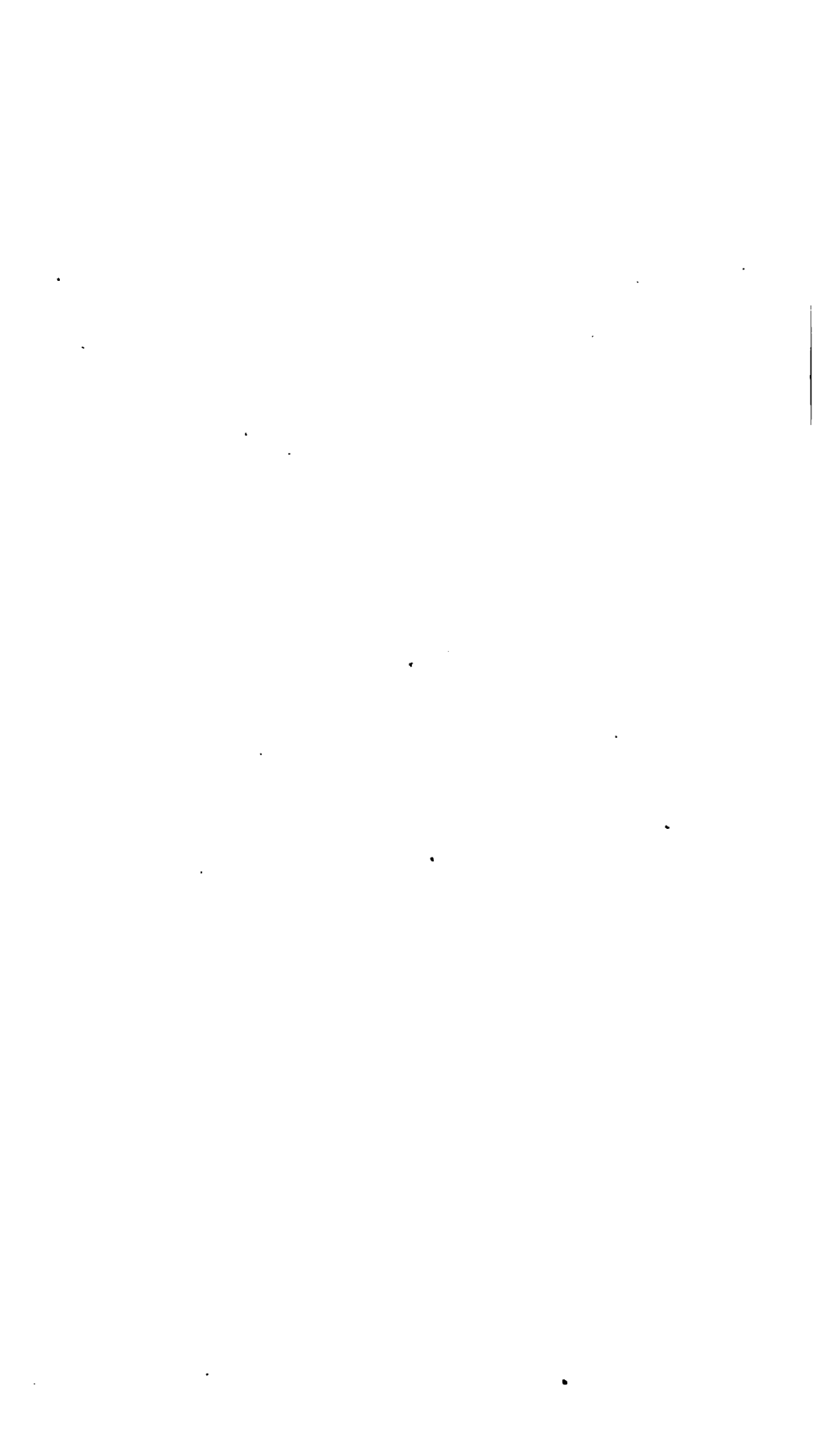
3. Postage paid on a commission should be allowed as a part of the costs thereof. *Ibid.*

WRIT OF ERROR.

See EVIDENCE, 1







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